141-60
602

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. ~~380~~. 60

A. H. JOHNSON, APPELLANT,

vs.

THE ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY.

FILED JULY 13, 1888.

No. ~~384~~. 71

THE ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY, APPELLANT,

vs.

A. H. JOHNSON.

FILED AUGUST 8, 1888.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

FILED JULY 13, 1888, and AUGUST 8, 1888.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 380.

A. H. JOHNSON, APPELLANT,

vs.

THE ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY.

FILED JULY 13, 1888.

No. 394.

THE ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY, APPELLANT,

vs.

A. H. JOHNSON.

FILED AUGUST 8, 1888.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

INDEX.

	Original.	Print.
Caption	1	1
Bill of complaint	1	1
Order for injunction	11	4
Exhibit A to bill—Contract between The Iron Mt. & Helena R. R. Co. *et al.* and A. H. Johnson, April 23, 1879	13	5
Certificate of deposit	21	7
Order for injunction	21	7

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 31, 1890.

	Original.	Print.
Injunction and proof of service of same	24	8
Subpœna	27	9
Marshal's return	28	10
Order filing answer	29	10
Answer	30	11
Replication	61	20
Order filing motion to dissolve injunction	62	20
Motion to dissolve injunction	63	20
Order denying motion to dissolve injunction, &c.	64	21
Notice to take depositions	65	21
Notary's certificate as to testimony	67	22
Testimony of Edwin G. Merriam	69	22
Exhibit A—Agreement between A. H. Johnson and The Iron Mt. & Helena R. R. Co.	109	34
B—Agreement of Wm. Bailey, Nov. 27, 1882	110	34
C—Statement of account	113	35
D—Letter of Jno. C. Brown to Tappan & Hornor, May 1, 1883	118	38
E—Letter of Tappan & Hornor to Jno. C. Brown, May 17, 1883	119	38
Notices to take depositions	121	39
Notary's certificate as to testimony	127	41
Testimony of A. H. Johnson	128	41
Jno. J. Hornor	158	50
Exhibit A (Johnson)—Letter of S. W. Fordyce, pres't, to A. H. Johnson, Jan. 18, 1887	172	54
Final decree	175	55
Allowance of appeals	176	55
Clerk's certificate	177	55

1 UNITED STATES OF AMERICA,
Eastern Division, Eastern District of Arkansas.

Be it remembered that at a regular term of the district court of the United States in and for the eastern division of the eastern district of Arkansas, held at the Federal court-rooms, in the city of Helena, in said district, on the — day of March, 1887, there was present and presiding Hon. Henry C. Caldwell, judge of said court; Thomas Fletcher, marshal of said district, and Samuel I. Clark, clerk of said court, when the following, among other, proceedings were had on the 27th day of August, 1887, it being the vacation of said court, viz:

Bill of Complaint and Application for Injunction.

In the District Court of the U. S. for Eastern Dist. of Arks., at Helena.

2 To the Hon. Henry C. Caldwell, judge:

The St. Louis, Iron Mountain and Southern Railway Company, a corporation organized and existing under and by virtue of the laws of the State of Arkansas and a resident of the district aforesaid, brings its complaint in equity against A. H. Johnson, a citizen of the State of Ohio, and respectfully shows to your honor—

That in the year 1879 the said Johnson entered into a contract with the Iron Mountain and Helena Railroad Company to build and construct eighteen miles of the track of said company's proposed road from a point eight miles north of Helena, Arkansas, to the town of Marianna, in said district.

That by the terms of said contract it was agreed that the said Johnson should be entitled to hold and retain possession of the said eighteen miles of road until he should be fully paid the amount stipulated in said contract for such work.

3 A true copy of said contract is hereto attached as Exhibit "A" and made a part hereof.

That in September, 1880, after the said Johnson had built and completed the construction of said eighteen miles of track and was holding, using, and enjoying the same as security for the amount due to him on account of construction, said Iron Mountain and Helena R. R. Co., acting through its president, one William Bailey, forcibly dispossessed said Johnson of the said track.

That subsequently the said Johnson brought his action of forcible entry and detainer under the statutes of Arkansas, on the law side of this honorable court, for the recovery of possession of same.

That October 26th, 1882, complainant became the purchaser of and on Dec. 15th, 1882, took possession of the entire railroad track and appurtenances of the Iron Mountain and Helena R. R., extending from the town of Forrest City to the city of Helena and including the eighteen miles of track in question.

That thereafter this complainant was made a party defendant to the suit of Johnson *vs.* The I. M. & H. R. R. Co., and such proceedings were had in the same that the plaintiff Johnson was by the judgement of this honorable court awarded the right to be repossessed of said eighteen miles of said track.

That on writ of error to the U. S. Supreme Court the judgment aforesaid was affirmed, to wit, in January, 1887.

That said Johnson's right of possession is solely and alone by way of security for the payment of what may be justly due him from the I. M. & H. R. R. Co. or its vendees.

And this complainant further respectfully shows that on the 6th day of the month of October, 1881, and while said suit was still pending, a difference of opinion existed between the said Johnson and William Bailey, who represented said I. M. & H. R. R. Co. and Kansas City & Southern Railway Co., complainant's vendors, as to the amount justly due the former from the latter under said
5 construction contract.

That all differences in amount were at length adjusted and a sum certain ascertained and agreed upon between the parties, who reduced their agreement to writing in the nature of an account stated, as follows, to wit:

"It is agreed between A. H. Johnson and the Iron Mountain and Helena Railroad Company as follows, viz: That the amount due said Johnson for constructing that part of said Iron Mountain & Helena railroad between the former junction with the Arkansas Midland railroad and the town of Marianna, under a contract executed in April, 1879, is the sum of $25,000 at this date; and it is further agreed that the suit now pending in the United States district court for the eastern district of Arkansas, at Helena, is to be continued at the October term, A. D. 1881.

(Signed) IRON MT. & HELENA R. R. CO.,
Per WILLIAM BAILEY, *Pres't.*
A. H. JOHNSON."

6 the original of which is subject to the order of court; that when this complainant became the purchaser of said railroad it was induced to believe from the statements, declarations, and assurances of the said Baily that a much less sum than $25,000 was really due Johnson, and while he failed to make such assurances good he advised this complainant of the written stipulation and account stated above set forth as conclusive of Johnson's right to demand any larger sum than that therein stipulated.

That this complainant in good faith, relying upon the promises aforesaid of the said Bailey that he could and would furnish the *the* facts and data necessary to reduce the claim if said Johnson did not for some time offer to pay the amount named in said stipulation; but after the complete failure of the said Baily to make good his promises in that behalf and soon after the affirmance of
7 the judgment by the U. S. Supreme Court this complainant, through its attorneys, waited upon the said Johnson with a

view of settling amicably all differences and paying Johnson what was justly due him.

That upon said Johnson demanding more than the sum of $25,000, as provided for in the account stated, together with full legal interest, an agreement was not reached; that subsequently this complainant, through its attorneys, offered to pay and tendered to the said Johnson, at Helena, on the 24th day of August, 1887, the sum of thirty-three thousand eight hundred and twenty-five dollars, being the $25,000 aforesaid and interest on the same, at the rate of 6 per cent. per annum, from October 6th, 1881, to the date of said tender; which said offer and tender was then & there by the said Johnson declined and refused; and this complainant now offers to pay said sum of thirty-three thousand eight hundred and twenty-five dollars ($33,825), and brings the same into court and
8 places the same subject to the order of this court.

And complainant alleges that said sum is the full and just amount which this complainant is liable to pay to said Johnson in order to satisfy all claims and demands against this complainant and against the said 18 miles of its railroad track.

And this complainant charges and alleges that the said Johnson, with a view to compelling this complainant to pay a sum largely in excess of what is justly due, is preparing to take actual possession of said 18 miles of track, and to that end is building a connection between the Arkansas Midland railroad, which said Johnson partly owns and controls, and the Helena Branch of the St. L., I. M. & S. railway at a point eight miles north of Helena.

Complainant further charges that when said Johnson takes possession of said 18 miles of road, which he openly proposes to do, it will have the effect to cut off this complainant from all use,
9 benefits, and advantage of its line of railway the entire distance from Marianna to Helena.

That such a proceeding will result in irreparable damage to this complainant, causing it such loss and injury as it cannot be compensated for in an action at law.

That it will disable this complainant from discharging its duty to the public as a common carrier of freight and passengers over the portion of said railway above mentioned and from performance of its duties under contract with the United States Government in the carrying of its mail, and will otherwise cause this complainant to suffer irreparable damage and injury, for which it will have no adequate remedy at law, unless prevented and restrained by order of this court.

Wherefore, the premises considered, complainant prays for the aid of this court by its proper process to require the said Johnson, as defendant, to answer the matters and things set forth in
10 this complaint, as provided by law, and that in the meantime he and his agents, servants, and employees and representatives be restrained from any interference whatever with the 18 miles of the track of this complainant or any part thereof, to wit, the track of the Helena Branch of the St. Louis, Iron Mountain and Southern

railway from the town of Marianna, Arkansas, for eighteen miles in the direction of Helena, Arkansas.

And that upon the final hearing of this cause said defendant be perpetually enjoined from any attempt to take possession of or any interference with said portion of railway track, and for such other and further relief as to the court may seem meet and proper; and complainant, as in duty bound, will ever pray, &c.

DODGE & JOHNSON,
Sol's for Complainant.

STATE OF ARKANSAS, }
County of Pulaski. }

E. G. Merriam states that he is an agent of the St. Louis,
11 Iron Mountain & Southern Railway, in which is included the 18 miles of track referred to in the foregoing complaint; that the matters and things set forth in said complaint are true so far as stated from personal knowledge, and when made from information and belief he believes them to be true.

E. G. MERRIAM.

Sworn to and subscribed before me this 25th day of August, 1887.
[SEAL.] JOSEPH K. BRANTLY,
Notary Public.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY }
vs.
A. H. JOHNSON. }

On reading and filing the bill in this cause it is ordered that upon the plaintiff paying into the German National Bank of Little Rock, Ark., the depository of the court, to the credit of the court, in this cause, the sum tendered in the bill, viz., thirty-three thousand eight hundred and twenty-five (833,825.00) dollars, and
12 the payment to the clerk of all costs in the case of A. H. Johnson *vs.* The Iron Mountain & Helena Railway Company, that a temporary injunction shall issue enjoining the defendants and his agents and attorneys from issuing or causing to be issued any process to put the plaintiff out of the possession of the eighteen miles of railroad track mentioned in the bill, or in any other manner disturbing the plaintiff's possession of said railroad track until the further order of the court in the premises; and upon the payment of the sum so tendered into the depository of the court the defendant may demand and receive the same, when it shall please him to do so, without prejudice to any of his rights, and particularly without prejudice to his right to receive any further sum that may be due him and for which he has by contract or the judgment of the court a lien on said eighteen miles of railroad track or a right to the possession of the same as security therefor.

The service on the defendant of a certified copy of this
13 order shall be deemed a sufficient service of the injunction herein ordered.

Aug. 25, 1887.

HENRY C. CALDWELL,
U. S. Dist. Judge, East. Dist. Ark.

Endorsed: Filed August 27, 1887. Samuel I. Clark, clerk.

EXHIBIT A TO BILL.

This contract, made and entered into this 23rd day of April, A. D. 1879, by and between the Iron Mountain & Helena Railroad Company, a corporation duly organized under the laws of the State of Arkansas, and having its office and principal place of business at Helena, in said State of Arkansas, and Frank M. Green, of the city of St. Louis, in the State of Missouri, the assignee of William Bailey and associates, who were the assignees of the Southwestern Construction Company, a corporation organized under the laws of the State of Missouri, parties of the first part, and A. H. Johnson, of the
14 city of Helena, in the State of Arkansas, party of the second part hereto, witnesseth:

That whereas a contract was entered into between the said Iron Mountain & Helena Railroad Company and the said Southwestern Construction Company for the construction, ironing, and equipping the railroad of the said Iron Mountain & Helena Railroad Company, which said contract was assigned by said Southwestern Construction Company to said William Bailey and associates, and which said contract was also assigned by said William Bailey and associates to said Frank M. Green, all of said assignments having been approved and ratified by said Iron Mountain and Helena Railroad Company; and whereas the said parties of the first part have purchased a sufficient quantity of iron rails, spikes, fastenings, and switches to lay the track of said Iron Mountain & Helena railroad from its junction with the Arkansas Midland railroad, eight miles west of Helena, to the town of Marianna, in the county of Lee, in said State
15 of Arkansas, a distance of about eighteen miles, and have a road-bed partially graded and desire to have the same completed to said town of Marianna:

Now, therefore, this agreement further witnesseth: That the said A. H. Johnson, for and in consideration of the sum of twenty-nine thousand dollars, to be paid to him as hereinafter stipulated, agrees, undertakes, and covenants to complete the grading, bridging, tieing, culverting, clearing, and grubbing on said Iron Mountain & Helena railroad between its said junction with said Arkansas Midland railroad and said town of Marianna; to furnish all cross-ties and square timber needed for said purpose and not on a line of said Iron Mountain & Helena railroad belonging to said first party; to lay down the iron rails and place said road between said points in good running order for the passage of locomotives and cars over the same,

the said first party furnishing the said second party the iron rails, fastenings, spikes, and switches as the same may be needed
16 from time to time for said work, the said road between said junction and said town of Marianna to be completed as aforesaid on or before the 1st day of September, A. D. 1879, the said first party keeping and performing the agreement and stipulation herein contained on their part to be performed; and the said first party hereby agree to and with said second party, he keeping and peforming the stipulations herein contained on his part to be performed, to pay to said second party the sum of twenty-nine thousand dollars for constructing and completing said Iron Mountain and Helena railroad from said junction to said town of Marianna in the manner hereinbefore specified, said sum to be paid as follows, viz: The sum of one thousand dollars as and at the time each mile of said railroad is completed and ready for the running of locomotives and cars on the same, commencing at the point of said junction with said Arkansas Midland railroad, including that portion now completed and on which the track is laid, and continuing to said
17 town of Marianna, a distance of about eighteen miles, and the balance of said sum when said track is laid and the superstructure of said railroad is completed to said town of Marianna and ready for the running over the same of locomotives and cars.

And it is further hereby agreed that all monies which may be collected by a committee of citizens appointed on behalf of certain citizens of Helena who have subscribed money to aid in building said Iron Mountain & Helena railroad, and which they may desire to pay on said work, shall be paid by said committee to said second party directly, and all payments so made shall be in discharge *pro tanto* of this contract; and it is further hereby agreed that until said sum of twenty-nine thousand dollars is fully paid — said second party he, the said second party, shall have the possession of said railroad, and shall have the right to run, use; and control the same, but said right of possession shall cease and determine and
18 said second party shall deliver up possession of said railroad to said first party when and as soon as said sum of twenty-nine thousand dollars is fully paid to said second party; and it is further hereby agreed that said first party may at any time terminate this contract by paying to said A. H. Johnson the value of the work then done and performed by him, and in estimating the value of the work the whole value to the town of Marianna is fixed at said sum of twenty-nine thousand dollars, and the proportion then performed by him is to be paid for at the rate of twenty-nine thousand dollars for the whole; and in the event said parties cannot agree as to the value of said work, then the said first party are to select one arbitrator and the second party is to select one *party*, and, said arbitrators so selected may select a third, and the decis-
19 ion of said arbitrators shall be final and binding on both parties hereto; and said first party hereby agree and bind themselves to furnish to said second party iron rails, fastenings, and spikes from time to time as rapidly as he may be ready to lay the same in constructing said railroad as aforesaid.

It is further understood and agreed between the parties of the first part that nothing in this contract shall be construed as at all impairing or annulling the contract heretofore entered into and now existing between said Iron Mountain & Helena Railroad Company and said Frank M. Green, as assignee as aforesaid, for the construction of said railroad; and whereas a contract is now existing between said parties of the first part and the Indianapolis Rolling Mill Company for the furnishing of iron rails for said Iron Mountain & Helena railroad, by which said contract said Indianapolis Rolling Mill Company have a lien on the first-mortgage bonds of said railroad company now in possession of the Union Trust Company of New York, it is hereby agreed that none of said mortgage bonds shall be withdrawn from said trust company until said sum which may be due said second party is fully paid or said second party shall consent thereto.

In testimony whereof said Iron Mountain and Helena Railroad Company, by its president, Wm. Bailey, and the said Frank M. Green, by Wm. Bailey, his attorney-in-fact, and the said A. H. Johnson have hereunto set their hands and seals the day and year first above written.

IRON MOUNTAIN & HELENA R. R. CO., [SEAL.]
Per WM. BAILEY, *Pres't.* [SEAL.]
FRANK M. GREEN, [SEAL.]
Per WM. BAILEY, *Att'y-in-Fact.*
A. H. JOHNSON. [SEAL.]

Endorsed: Filed Aug. 27, 1888. Samuel I. Clark, clerk.

Attached to said bill and exhibits is the following, viz:

No. 3316.

German National Bank, Designated Depository of the United States.

Jno. G. Fletcher, president. C. T. Walker, cashier.

LITTLE ROCK, ARK., *Aug.* 26, 1887.

The St. Louis, Iron Mountain & Southern Railway Company, through Dodge & Johnson, attorneys, has this day deposited thirty-three thousand eight thundred and twenty-five (33,825) dollars to the credit of the United States district court at Helena in the case of St. L., I. M. & So. R'y Co. *v.* A. H. Johnson.

GERMAN NATIONAL BANK,
By OSCAR DAVIS, *Teller.*

(Original.)

Endorsed: Filed Aug. 27, 1887. Samuel I. Clark, clerk.

On the 27th day of August, 1887, the following order was entered in vacation:

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY CO.
vs.
22 A. H. JOHNSON.

On this day come the complainant, by its solicitors, Dodge and Johnson, and files complaint herein, and the following order is endorsed thereon:

On reading and filing the bill in this cause it is ordered that upon the plaintiff paying into the German National Bank of Little Rock, Ark., the depository of this court, to the credit of the court in this cause, the sum tendered in the bill, viz., thirty-three thousand eight hundred and twenty-five ($33,825) dollars, and the payment to the clerk of all costs in the case of A. H. Johnson *vs.* The Iron Mountain & Helena Railroad Company and St. Louis, Iron Mountain & Southern Railway Company, that a temporary injunction shall issue enjoining the defendant and his agents and attorneys from issuing or causing to be issued any process to put the plaintiff out of the possession of the eighteen miles of railroad track mentioned in the
23 bill or in any other manner disturbing the plaintiff's possession of said railroad track until the further order of the court in the premises; and upon the payment of the sum so tendered into the depository of the court the defendant may demand and receive the same, when it shall please him to do so, without prejudice to any of his rights, and particularly without prejudice to his right to recover any further sum that may be due him and for which he has by contract or the judgement of the court a lien on said eighteen miles of railroad track, or a right to the possessing the same as security therefor.

The service on the defendant of a certified copy of this order shall be deemed a sufficient service of the injunction herein ordered.

HENRY C. CALDWELL,
U. S. Dist. Judge, East. Dist. Ark.

Aug. 25, 1887.
Attest:
SAMUEL I. CLARK, *Clerk.*

24 *Service.*

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY
vs.
A. H. JOHNSON.

On reading and filing the bill in this cause it is ordered that upon the plaintiff paying into the German National Bank of Little Rock, Ark., the depository of this court, to the credit of the court in this cause, the sum tendered in the bill, viz., thirty-three — eight hundred and twenty-five ($33,825) dollars, and the payment to the clerk of all costs in the case of A. H. Johnson *vs.* The Iron Mountain & Helena Railroad Company, that a temporary injunction shall issue

enjoining the defendant and his agents and attorneys from issuing or causing to be issued any process to put the plaintiff out of the possession of the eighteen miles of railroad track mentioned in the bill or in any other manner disturbing the plaintiff's possession of said railroad track until the further order of the court in the premises; and upon the payment of the sum so tendered into the depository of the court the defendant may demand and receive the same, when it shall please him to do so, without prejudice to any of his rights, and particularly without prejudice to his right to recover any further sum that may be due him and for which he has by contract or the judgement of the court a lien on said eighteen miles of railroad track or a right to the possession of the same as security therefor.

The service on the defendant of a certified copy of this order shall be deemed a sufficient service of the injunction herein ordered.

HENRY C. CALDWELL,
U. S. Dist. Judge, East Dist. Ark.

Aug. 25, '87.

UNITED STATES OF AMERICA,
Eastern Division, Eastern District of Arkansas.

I, Samuel I. Clark, clerk of the United States district court for the eastern division of the eastern district of Arkansas, hereby certify that the above and foregoing is a true and perfect transcript of the order of injunction in the above-entitled cause as the same remains of record in my office.

In testimony whereof I have hereunto set my hand and the seal of said court this the 27th day of August, 1887.

[SEAL.] SAMUEL I. CLARK, *Clerk.*

Endorsed: I have this day served this notice upon John J. Hornor, att'y of record of the within-named A. H. Johnson, by delivering to him in person a true copy of the same and by delivering a true copy of the same to J. B. Johnson, the agent of the said A. H. Johnson, he being absent from the State, this the 27th day of August, 1887. Thomas Fletcher, U. S. marshal, D. E. A., by Samuel W. Tappan, D. U. S. mar. Marshal's fees, serving 2 writs, $4.00.

Returned and filed Aug. 29, 1887.
SAMUEL I. CLARK, *Clerk.*

UNITED STATES OF AMERICA,
Eastern Division, Eastern District of Arkansas.

The President of the United States to A. H. Johnson, Greeting:

We command and strictly enjoin you that, laying all other matters aside and notwithstanding any excuse, you and each of you be and personally appear before the judge of our district court of the United States in and for eastern division of eastern district of

Arkansas, at Helena, in chancery sitting, on the 10th day of October, A. D. 1887, it being the second Monday of October next, wheresoever the said court shall then be, and there to answer a bill of complaint exhibited against you in our said court by the St. Louis, Iron Mountain & Southern Railway Company, and to do further and receive what our said court shall have considered in that
28 behalf; and this you are not to omit under penalty of what the law directs.

In testimony whereof Hon. Henry C. Caldwell, judge of the district court of the United States for the eastern district of Arkansas, has caused the seal of said court to be hereunto affixed this 27th day of August, A. D. 1887, and in the 112th year of our Independence.

Attest:

[SEAL.] SAMUEL I. CLARK, *Clerk.*

N. B.—The defendant is required to enter his appearance in the above cause in the clerk's office of this court on or before the 3d day of October, 1887, or the bill will be taken *pro confesso* against him.

SAMUEL I. CLARK, *Clerk.*

Endorsed: I have served the within subpœna on the within-named A. H. Johnson by leaving a true copy of the same in the hands of J. B. Johnson, his agent, at his usual place of busi-
29 ness and abode, the said A. H. Johnson being absent from the State, at Helena, in the eastern district of Arkansas, on this 27th day of August, A. D. 1887. Thomas Fletcher, U. S. marshal for east. dist. Ark., by Samuel W. Tappan, deputy marshal. Marshal's fees, 1 service, $2.00.

Returned and filed August 29, 1887.

SAMUEL I. CLARK, *Clerk.*

On the 5th day of September, 1887, the following order was entered:

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY }
vs.
A. H. JOHNSON. }

Now, on this day, comes the defendant in this cause, by his solicitors, John J. & E. C. Hornor, and files his answer herein.

Attest: SAMUEL I. CLARK, *Clerk.*

30 *Answer of A. H. Johnson.*

In the District Court of the United States for the Eastern Division of the Eastern District of Arkansas.

THE ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY CO., Complainant,
vs.
A. H. JOHNSON, Defendant.

The defendant, A. H. Johnson, saving and reserving to himself all manner of exception and advantage to the many inaccuracies and insufficiencies in said complainant's bill contained, for answer thereto or unto so much and such parts thereof as he is advised by counsel it is material or necessary to make answer hereto, answering, says:

He admits that complainant is a corporation organized under the laws of the State of Arkansas, and that he is a citizen of the State of Ohio.

31 He admits that in the year 1879 he entered into a contract with the Iron Mountain and Helena Railroad Company to build and construct eighteen miles of the track of said company's proposed road from its junction with the Arkansas Midland railroad, eight miles west of Helena, to the town of Marianna, a distance of about 18 miles.

He admits that by the terms of said contract he was to be entitled to hold and retain possession of said eighteen miles of railroad until he was fully paid the amount due him according to the terms of said contract, and he states that said contract was duly filed for record and recorded in the counties of Phillips and Lee, in said State of Arkansas, the counties in which said eighteen miles of railroad *was* situated.

He believes Exhibit "A" to said complainant's bill is a true copy of said contract, but if on comparison with the original it should be found not to be a true copy he will ask leave to file as a part

32 of this answer a true copy from the records of said counties or one of them.

He admits that in September, 1880, while he was in the lawful and peaceable possession of said eighteen miles of railroad and running and operating the same under the terms of said contract, he was forcibly and unlawfully deprived of the possession of same by said Iron Mountain & Helena Railroad Company, acting through its president, William Bailey.

He admits that subsequently to said forcible dispossession from said railroad and its operation he brought his action on the law side of this court to recover possession of said eighteen miles of railroad, which suit he charges was brought on the 4th day of February, 1881.

He admits that on or about the 15th day of December, 1882, the complainant took possession of the entire track of said Iron Mount-

ain & Helena railroad, extending from the town of Forrest City to the city of Helena, including said eighteen miles of track so
33 built and constructed by said defendant as aforesaid; but he has no knowledge, information, or belief as to when the purchase of said railroad from said Iron Mountain and Helena Railroad Company was made, and, if it is material to complainant's cause, asks that it may be required to strictly prove same.

He admits that after said complainant took possession of said eighteen miles of track it was made a party defendant to the said suit of Johnson *vs.* The I. M. & H. R. R. Co., and that it was adjudged by this hon. court that he, this defendant, was unlawfully and forcibly deprived of the possession of said eighteen miles of track, and that he should be put in possession of same, which judgement was afterward, in January, 1887, affirmed by the Supreme Court of the United States; and this respondent states that said complainant was so made a party defendant to said suit on its own motion, filing its answer, adopting the answer of said Iron Mount-
34 ain and Helena Railroad Company, and took upon itself the entire defense of the suit, the said Iron Mountain & Helena Railroad Company being a nominal party.

He denies that his right of possession of said 18 miles of track was solely as a security for the payment of such sum as might be due him under said contract, but charges that the right to possess same was to be as a security for all sums due and as further compensation for building and constructing said eighteen miles of track, and was to continue until said railroad company had fully complied with the terms of said contract.

He denies that on the 6th day of October, 1881, the writing which is copied into said complainant's bill of complaint and is signed by the Iron Mountain and Helena Railroad Co., per William Bailey, pres't, and by A. H. Johnson was signed to adjust any difference of opinion existing as to the amount due said Johnson, this respondent, under said contract. He admits that said paper was signed,
35 and that it is now in the possession of claimant's attorneys, but he denies that same was executed or delivered or intended to be operative. He says that the same was signed under the following circumstances and no other, viz:

Said suit was pending for possession, and on or about the 6th day of October, 1881, said William Bailey, then the president of said Iron Mountain and Helena Railroad Co., represented to said respondent that if said cause was continued at the October term of the court for 1881 he could and would raise the money to pay said respondent or could obtain such securities to deliver to said Johnson as would be perfectly satisfactory to him, and in order to raise said money or securities it would be necessary for him to have a sum fixed which said respondent would accept and discontinue the suit, and the time within which the money was to be raised or securities deposited was not to be longer than the month of November then next ensuing; and this respondent agreed to accept said sum
36 of twenty-five thousand dollars if the same was paid or the securities deposited with himself or his attorney within the time

aforesaid, and this paper was signed, but the same was retained by this respondent in his own possession, and it was not to take effect unless within the time aforesaid said sum was paid or secured to the satisfaction of respondent, which was never done; and it was not delivered to said Bailey or any one else, but remained in possession of respondent until the trial of the action for possession at the March term, 1883, of this hon. court, when it was produced by this respondent to contradict a statement made by Wm. Bailey, a witness for defendants in said cause; that after the failure of said Bailey to raise the money or deposit securities acceptable to this respondent said writing was a nullity and was so treated by both said Bailey and this respondent. Said Bailey and the complainant in this cause claiming that only the sum of $12,000.00 was due this respondent under said contract before said trial, on said trial, and since said trial, and in January last said writ-

37 ing having been left with the papers in cause of this respondent *vs.* The Iron Mountain and Helena Railroad Co. and the St. Louis, Iron Mountain and Southern Railway Co., the attorneys of complainant obtained same from the clerk of this court, said papers never having been filed and not being one of the files in said cause; that said paper was left there by attorney of respondent because it was of no validity, never having been delivered to said Bailey or shown to complainant before the purchase of said railroad, and in January last in discussing this matter with the attorneys of said complainant the attorneys of respondent told them that such a paper had once been signed and where it could be found, and thereupon said attorneys procured said paper from said clerk and set it up as a valid and subsisting contract of settlement.

38 Respondent states that after the judgement in said possessory action rendered in this court he offered to accept $21,000.00 in full settlement, if paid in cash, which said complainant declined to pay, and after the affirmance of said judgment by the Supreme Court of the United States the said complainant, through its officers and attorneys, urged this offer of compromise as conclusive on respondent as to the amount due him, and the propriety of same was quite equal to that of setting up a paper not delivered from where it had been left by respondent as a worthless paper as conclusive on respondent's rights.

He denies that Bailey ever advised complainant of the existence of this paper and says that the only defense ever set up by Bailey or this complainant after its purchase against the contract was that the construction of the road had not cost this respondent exceeding

39 the sum of $12,000.00 or $15,000.00, and therefore he should not recover any greater sum; and complainant's attorneys repeatedly told this respondent that they could not settle with him because they were advised by Bailey that only about $12,000.00 or $15,000.00 was due him, and particularly in the month of April, 1883, when the offer of $21,000.00 was made by this respondent, was this statement made; and while he presumes the statement contained in said complainant's bill, that Bailey induced complainant to believe that "a much less sum than $25,000.00 was really due Johnson," yet he

denies that Bailey ever advised complainant that the written statement set forth in complainant's bill was in existence or had ever been signed. And this respondent says that even if said Bailey had made such an improbable statement the most ordinary diligence would have disproved its truth, as no business man would
10 have made a purchase relying on the existence of such a paper without asking to see it; and upon such a question being asked it would readily have been found that the paper was in possession of this respondent, who could and would have disabused claimant as to its validity or the truth of Bailey's statements; but this respondent states that although his contract was of record in the counties of Phillips and Lee, in the State of Arkansas, through which said Iron Mountain and Helena railroad ran, and although his suit was pending in this hon. court, on its law side, at the time of the purchase by said complainant of the railroad of said Iron Mountain and Helena Railroad Co., yet, without showing that any effort was made to verify the statements of Bailey, it is now asked of a court of equity to condone the negligence of complainant's agents and employees and deprive this respondent of
11 his right to possess this track, from which the highest tribunal in this land has adjudged that he was forcibly and unlawfully ejected, and to keep him out of his rights for another seven years while it can make an effort to reduce the amount due him. An adjudged trespasser is allowed to enjoy the fruits of his trespass until with the weight of a mighty corporation the humble strength of a weak individual can be exhausted. Respondent denies that soon after the affirmance of said judgment by the Supreme Court of the United States said "complainant, through its attorneys, waited upon the said Johnson with a view to settling amicably all differences and paying Johnson what was justly due him," or that an agreement was not reached because he, this respondent, demanded more than the sum of $25,000.00. He states that in
12 the month of January, 1887, Messrs. E. G. Merriam and Geo. E. Dodge, attorneys for said complainant, came to Helena to discuss, as they said, the subject of settlement; but if they came to settle with respondent they very effectually concealed the purpose of their visit. Their object was to ascertain what was the least sum respondent could be induced to accept and to report. They confessedly had no authority to make any settlement, and respondent for this reason did not propose or intend to make any proposition. He denies that he demanded from them any sum or that they were authorized to offer him any sum. He says that he listened patiently to the statement made by said attorney, whose purpose seemed to be to convince respondent that one William Bailey had deceived the corporation which they represented, and in consequence thereof he, this respondent, should accept whatever sum the man-
13 aging officers of the complainant should graciously concede to him. He did say that he ought to have a sum much in excess of $25,000.00, but he never demanded it, for he was then treating with gentlemen who had no authority to do anything but re-

ceive proposals, and he had no proposals to make. It was for complainant to act.

Respondent says that, ascertaining from these gentlemen that they had no authority to act, at their request he went to St. Louis to see the general manager of said complainant, and when he arrived in St. Louis he called at the general offices of said complainant, and when the case had been explained to said general manager he advised that respondent should call on Jay Gould, in the city of New York, to which office all the papers would be referred. Accordingly this respondent went to the city of New York, and on the 23d day of February, 1887, he called at the office of Jay Gould, but he
44 was too busy to see respondent, and he was referred to the general counsel, Judge Dillon. He called on Judge Dillon, was treated very courteously by him, and requested to call again next day. On the next day, the 24th, he called and saw Mr. Gould. The subject of the law case was discussed, but no proposition of settlement was made. After an interview of probably an hour he was requested to call again next day. On the next day he called at Mr. Gould's office; met him, Judge Dillon, and Mr. Hopkins, vice-president Missouri Pacific Railroad Company. Again the subject was discussed. The subject of the offer of compromise made in April, 1883, hereinbefore stated, was referred to. Mr. Gould said it should have been accepted, and he would now pay that sum. This was the only time when an approach was made to an offer to settle
45 with respondent or to pay him anything, the entire effort on the part of the officers of complainant seeming to be to try to induce respondent to yield his rights on account of bad faith on the part of Bailey in his representations that the railroad was free from encumbrances, and that he had terminal facilities at Helena not owned by him. On the said 25th day of February respondent remained with Mr. Gould until he seemed to desire an end to the interview, when respondent left, and Mr. Gould made no request for any further conference; and respondent says that although he had gone from Helena to St. Louis and from St. Louis to New York in order to try and amicably adjust this matter, yet complainant declined and failed to offer any settlement whatever, and continually urged on respondent the great hardship it was for it to pay him anything.

46 And this respondent denies that prior to the 24th day of August, 1887, complainant, through its attorneys or officers, ever offered to pay him any sum in settlement of his claim under said contract, unless the proposal of Mr. Gould to pay $21,000.00 as aforesaid could be construed into an offer of settlement, the only purpose of any of the interviews being to induce respondent to make some proposition and to prevail on him to accept from the attorneys of complainant their construction of the law applicable to his case. He also denies that he ever made any demand on them for any sum. He did at several times name sums which he said he thought he should receive and was willing to take, but he had resolved not to make any propositions, but to await such propositions as complainant might see fit to make. He had once, before

47 the purchase by complainant, tried to settle the claim, and for a payment or proper security was willing to make an abatement; and had manifested such willingness by his agreement with Bailey, and which Bailey not only failed to carry out but repudiated. He had, after the trial and judgment in this court, gone to St. Louis, at request of complainant, and offered again to compromise, and both these offers on his part were seized on by complainant to reduce his claim; and while he desired a settlement and manifested such desire by going to St. Louis and New York, he went there to listen to propositions which he had a right to expect from the officers of complainant, and when they would make none he saw that his only remedy was to enforce the judgment rendered by this court. In New York he was, on the evening of the 25th of February, 1887, dismissed by Jay Gould, the chief officer of
48 the complainant, and all negotiations terminated, and that, too, without any offer to settle his claim. It was politely done, but he was very effectually informed that he could obtain no settlement which the law did not compel.

Respondent states that under the contract exhibited with complainant's bill he was to construct that portion of the Iron Mountain and Helena railroad "between its junction with the Arkansas Midland railroad, about 8 miles west of Helena, and the town of Marianna;" that the line of the Iron Mountain and Helena railroad did not form a junction with the Arkansas Midland railroad, but from a point on the Arkansas Midland railroad eight miles west of Helena a railroad was constructed to connect said two roads which was a little less than one mile in length, it being the purpose to connect the two roads at this point and operate it, when constructed, to Helena over the eight miles of the Arkansas Midland rail-
49 road and use the depot and other terminal facilities of the said Arkansas Midland Railroad Co.; that prior to dispossessing this respondent the Iron Mountain and Helena Railroad Co. had built its line from Helena out to the point where this connecting road intersected its line; that when said Iron Mountain and Helena Railroad Co. took forcible possession of said 18 miles of track it tore up and destroyed this one mile of connecting road, removing the iron rails, ties, bridging, and trestles, and suffered the roadway to be destroyed; that in order to take possession of said eighteen miles of track and operate the same it was necessary for respondent to rebuild this connecting line of road; that according to the spirit and meaning of the contract it was his duty, if in possession, to operate said road for the public, and in the opinion rendered by the supreme court it was assumed that respondent
50 had operated same and would, if repossessed, operate the same in the interest of the public. Accordingly, before taking a writ of possession, he thought it his duty to prepare as far as possible for the rebuilding of this connecting road, which was a part of the 18 miles built by him and from which he was dispossessed.

That after his dismissal as aforesaid by Mr. Gould his attorney informed the attorneys of complainant, Messrs. Dodge & Johnson, of the result of the conference in New York, and in April following

his attorneys, by letter, informed said attorneys that they would advise respondent at his convenience to take possession of said railroad track. From this communication nothing was heard. When said Iron Mountain and Helena Railroad Co. so took forcible possession of said 18 miles of track as aforesaid the *guage* of the same, as well as of the Arkansas Midland Railroad, was 3 feet 6
51 inches. Immediately on taking possession the said Iron Mountain and Helena Railroad Co. changed said *guage* to 4 feet 8½ inches, and the *guage* has continued the same ever since. To take possession of said railroad track and operate same over said 8 miles of the Arkansas Midland railroad required that the *guage* of the 18 miles be reduced to that of the Arkansas Midland, or that the *guage* of the Arkansas Midland should be changed to 4 feet 8½ inches, and as the connections from Marianna would be 4 feet 8½ inches respondent thought that instead of reducing the *guage* of said 18 miles of track it was the interest of the public to widen the *guage* of the Arkansas Midland railroad, and accordingly he prepared to and did change the *guage* of the Arkansas Midland railroad to 4 feet 8½ inches, purchased new rolling stock, and put same in readiness for operating the 18 miles of track
52 to Marianna; that before the filing of the bill in this cause he had purchased steel rails, railroad ties, and bridge and trestle timbers for relaying said one mile of connecting road, and had, before the notice of injunction in this cause, caused a great part of such materials to be delivered at the point of junction with the Arkansas Midland railroad, and had caused a part of the road-bed to be cleared off, and otherwise incurred expenses amounting in the aggregate to several thousand dollars; that when he commenced work on this connecting road and was preparing to have said track relaid the officers and attorneys of said complainant awoke from an indifference which utterly ignored respondent's rights, and on the 23d day of August, 1887, Messrs. Merriam and Dodge arrived in Helena, and after the same effort to get respondent to make a proposition for settlement, and after they had been informed that no offer had ever been made to pay respondent any sum, and
53 that he would not make any proposition, but would listen to and accept or reject any proposition made if they were authorized to make a definite proposition of settlement, Mr. Merriam offered to pay him $25,000.00 and ten per cent. per annum interest on that sum from October 6th, 1881, being one-third of the interest at six per cent., claiming that the contract gave possession for the principal sum, but not for any interest. This proposition respondent rejected. The said Merriam then, after consultation with his colleague, Mr. Dodge, offered and tendered to respondent the sum of $33,805.00 in full satisfaction of his claim, which respondent refused to receive. The said Merriam exhibited the money and desired to count it and to show that it was in legal-tender notes, which respondent waived, and told him he acknowledged a legal and valid tender of that sum, and the said Merriam then reduced to writing an ac-
54 knowledgment of a valid and legal tender of that sum and a refusal to receive it, which respondent refused to sign, because

respondent thought the evidence of the tender fully sufficient, and if the attorney was not satisfied with his work and the evidence of the gentlemen present he could call as many witnesses as he chose; and respondent says that this was the first and only proposition ever made to him to pay him any sum on his said claim, and that he refused it because it was less than the amount originally due him by the contract; that it was made after complainant well knew that he had incurred large expenses preparatory to taking possession of said track, which expense was caused by the utter failure and refusal of said complainant to make any settlement, although respondent's rights to possession had been established by the judgment of the highest court in this land, and although he had sought an amicable adjustment from the officers of said company,
55 commencing in Arkansas and ending in New York, with the chief of the system, Jay Gould himself.

Respondent says that the sum tendered as well as the sum deposited in the registry of this hon. court is far below the legal, much less the equitable, demands of this respondent under said contract; that at the time he entered into said contract he was the sole owner of the Arkansas Midland railroad and was managing and operating the same; that it had depot, yards, switches, machine shops, rolling stock, and other facilities for handling business in excess of the business on its line, and one of the main and chief inducements which caused him to enter into the contract for constructing said 18 miles of track was the agreement by which, until paid, he had the right to operate the same over the 8 miles of the Arkansas
56 Midland railroad, and by reason of use of said track and terminal facilities of said Arkansas Midland Railroad Co. increase the income of said last-named road, as a reasonable charge for the use of its track and terminals would amount to from $30.00 to $60.00 per day, depending on the business done or number of trains run; that this was as much of an inducement to enter into said contract as the money consideration mentioned therein and formed as quite as great a consideration to him; that the complainant adopted the trespass of the Iron Mountain and St. Helena Railroad Co. and justified under it, appealed from the judgment of this court, and alone prosecuted said appeal in the Supreme Court.

Respondent admits that he was building such connecting road as charged in said bill, and that when same was completed he proposed to take possession of said 18 miles of track and still proposes to do so if this hon. court permits; that it was strenuously
57 urged in argument, by counsel of complainant before the Supreme Court that if judgement was rendered in the law case for possession of said 18 miles of track it would irreparably injure complainant and prevent it from discharging its duty to the public as a common carrier; but the court informed counsel that it appeared respondent was operating the road, and presumably in the public interest, when he was forcibly dispossessed, and the court was bound to presume he would operate the same as a common carrier in the public interest when restored to possession, and so he says

that the allegation of damage to the public has already been ruled against by a very high tribunal.

Respondent says but for his duty to the public he would not have incurred the great expense preparatory to taking possession, an expense caused by complainant't refusal and neglect to settle with him as aforesaid, and which expense complainant utterly ignores
58 and says it is no charge on it.

Respondent says that he could on any day since the affirmance of said judgment in the law case have taken his writ and been placed in possession without giving complainant an opportunity of applying for a restraining order, but he had no desire to obtain any advantage by any species of sharp practice. He relies on the justice of his cause. On the 15th of August, 1887, his attorneys received a telegram from the attorneys of complainant asking that respondent defer action until attorneys could go to St. Louis and try to effect an amicable settlement, which telegram was shown to respondent, and he consented that the writ be not taken out until a fair opportunity could be had to consult again, and he has at all times offered every opportunity for an amicable adjustment: but he respectfully submits that he did feel and does now feel that
59 an outrage was perpetrated on him when, in September, 1880, his employees were, in a land where law and order prevails, driven from the possession of this track at the muzzle of a pistol and with threats of personal violence.

Instead of meeting violence with violence he sought his redress in the courts. After a litigation for seven years he submits that it is not equitable or just that he should be prevented from enjoying the fruits of his litigation and the benefits to be derived from the operation of said road until complainant can settle by litigation the amount due him under said contract.

And having fully answered, the prayer of respondent is that he be hence dismissed with his costs, &c.

J. J. & E. C. HORNOR,
Attorneys for Respondent.

60 STATE OF ARKANSAS, }
County of ——. }

Albert H. Johnson, defendant in the above cause, states on oath that the statements contained in the foregoing answer so far as made upon his own knowledge are true, and so far as made upon the knowledge or information of others he believes them to be true.

A. H. JOHNSON.

Sworn to and subscribed before me this 6th day of September, A. D. 1887.

E. C. HORNOR,
[SEAL.] *Notary Public.*

Endorsed: Filed Sept. 5, 1887. Samuel I. Clark, clerk.

61 *Replication.*

In the U. S. Court, at Helena.

ST. LOUIS, I. M. & S. R'Y CO. vs. A. H. JOHNSON. } In Equity.

This repliant, saving and reserving unto himself all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto says that he will aver and prove his said bill to be true, certain, and sufficient in law to be answered unto, and that the said answer of the defendant is uncertain, untrue, and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in the said answer contained material or effectual in law to be replied unto,
62 confessed and avoided, traversed or denied, is true; all which matters and things this repliant is and will be ready to aver and prove as this honorable court shall direct, and humbly prays as in and by his said bill he has already prayed.

DODGE & JOHNSON,
Sol's for Pl'ff.

Endorsed: Filed December 9th, 1887. Samuel I. Clark, clerk.

On the 12th day of December, 1887, the following order was entered:

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY CO. vs. A. H. JOHNSON. }

Now, on this day, comes the defendant, in this cause, by his solicitors, and files motion to dis-olve the injunction heretofore granted in this cause.

63 *Motion to Dis-olve.*

In the District Court of the United States for the Eastern Division of the Eastern District of Arkansas.

THE ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY CO., Complainant, vs. A. H. JOHNSON, Defendant. } Motion to Dis-olve Injunction.

The defendant, A. H. Johnson, comes and moves the court to dis-olve the injunction heretofore issued herein because he says that there is no equity in said complainant's bill.

Second. Because the statements of said complainant's bill on which said injunction was granted are denied by the answer and are not true.

Third. Because said injunction was granted without any notice to defendant and without any appearance by him, and his answer filed herein denies all the material allegations of said complainant's bill.

64 JNO. J. & E. C. HORNOR,
Sol's for Def't.

Endorsed: Filed December 12, 1887. Samuel I. Clark, clerk.

On the 13th day of December, 1887, the following order was entered, viz:

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY CO.
vs.
A. H. JOHNSON.

This cause coming on to be heard upon the motion of the respondent to dis-olve the injunction heretofore ordered in this cause, and said motion having been argued by counsel and submitted to the court, is by the court denied. It is therefore considered, adjudged, and decreed that the injunction heretofore granted in this cause be continued in force until the further order of this court, and that this cause be set down for final hearing at the March term, 1888, of this court, with leave for both sides to take depositions until the first day of March, 1888.

65

Depositions.

Notice to take depositions in U. S. court, at Helena, Arkansas.

ST. L., I. M. & S. R'Y CO., Plaintiff,
vs.
A. H. JOHNSON, Defendant.
} Notice to Take Depositions.

To A. H. Johnson, the above-named defendant:

You are hereby notified that depositions of witnesses, to be read in evidence in the above-entitled cause on the part of the plaintiff, will be taken at the office of T. J. Portis, corner of 6th and Locust streets, in the city of St. Louis, in the county of St. Louis, State of Missouri, on the 21th day of February, A. D. 1888, between the hours of eight o'clock in the forenoon and six o'clock in the afternoon, and that the taking of the said depositions, if not completed on that day, will be continued from day to day, at the same place and between the same hours, until completed.

66

DODGE & JOHNSON,
Att'ys for Plaintiff.

We hereby acknowledge service and agree to take depositions as specified in the above notice.

JNO. J. & E. C. HORNOR,
Att'ys for Def't.

67 In the District Court of the United States for the Eastern District of Arkansas, at Helena.

THE ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY, Plaintiff,
vs.
A. H. JOHNSON, Defendant.

STATE OF MISSOURI, }
City of St. Louis, } *ss:*

I, Millard F. Watts, a notary public within and for said city of St. Louis, in said State of Missouri, hereby certify that on the twenty-fourth day of February, 1888, before me, at the office of T. J. Portis, Esq., corner of 6th and Locust streets, in said city of St. Louis, personally appeared, pursuant to the notice hereto annexed, between the hours of eight o'clock in the forenoon and six o'clock in the afternoon of that day, the witness, E. G. Merriam, Esq.; and T. J. Portis, Esq., appeared as counsel for the plaintiff, and Jno. J. Hornor, Esq., appeared as counsel for the defendant; and the said E. G.

68 Merriam, being by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, and being carefully examined, deposed and said, as appears by his deposition hereto annexed; and I further certify that the said deposition was then and there, by consent of counsel, taken down in short-hand, and, after being so taken in short-hand, was by me transcribed on the type-writer, and then subscribed by the said witness, Edwin G. Merriam, and the same has been retained by me for the purpose of sealing up and directing the same to the clerk of the court, as required by law.

And I further certify that the exhibits hereto attached and marked respectively Exhibits "A," "B," "C," "D," and "E," are the same exhibits that were produced, identified, and directed to be attached by the said witness, Edwin G. Merriam, to his deposition.

And I further certify that Exhibits "A," "D," and "E" have been carefully compared by me with the original papers of which they are respectively copies.

69 And I further certify that said exhibits are true, correct, accurate, full, and complete copies of said originals respectively.

And I further certify that the reason why said deposition was taken was that the said witness, Edwin G. Merriam, resides in the city of St. Louis, Missouri, and more than one hundred miles from the place where this cause is to be tried; and I further certify that I am not of counsel or attorney for either of the parties to this suit, nor am I interested in the event of the cause.

In testimony whereof I have hereunto set my hand and official seal, at my office, in said city of St. Louis, this 25th day of February, 1888.

[SEAL.]

MILLARD F. WATTS,
Notary Public, City of St. Louis, Mo.

EDWIN G. MERRIAM, being duly cautioned and solemnly sworn to testify the truth, the whole truth, and nothing but the truth, deposeth and saith as follows:

Direct examination by T. J. PORTIS, Esq.:

1 Q. State your name, age, residence, and occupation, please.

70 A. Edwin G. Merriam; residence, 1918 Rutger street, St. Louis, Missouri; occupation, assistant to the general solicitor of the Missouri Pacific and the St. Louis, Iron Mountain and Southern Railway Companies.

2 Q. How long have you been connected with the St. Louis, Iron Mountain and Southern Railway Company?

A. I have occupied the position of the assistant to the general solicitor since December 15, 1882.

3 Q. What connection had you with the St. Louis, Iron Mountain and Southern Railway Company previously to December 15th, 1882?

A. I had on occasions been specially employed by the general attorney of the St. Louis, Iron Mountain and Southern Railway Company, Judge T. J. Portis, to do professional work. I was so employed by him in the fall of 1882 to investigate matters connected with the acquisition of the Iron Mountain and Helena railroad in Arkansas by the St. Louis, Iron Mountain and Southern Railway Company.

71 4 Q. In the course of your examination of matters in connection with the Iron Mountain and Helena railroad, state if you ascertained anything, and what, in regard to the claim of A. H. Johnson, the respondent in this cause, against the Iron Mountain and Helena Railroad Company.

A. I learned that A. H. Johnson had a claim against the Iron Mountain and Helena Railroad Company arising out of construction, that claim being in the sum of twenty-five thousand dollars.

5 Q. State under what circumstances you first met Mr. A. H. Johnson, the respondent in this case, and state fully all that passed between you and Mr. Johnson on that occasion.

A. To the best of my recollection, the first time I met Mr. A. H. Johnson was just about five years ago this present month—that is to say, Febr'y, 1883. Mr. Johnson came to the gen'l solic-

72 itor's office of the St. Louis, Iron Mountain and Southern Railway Company in St. Louis, in this building, and introduced himself to me. He came alone, as I recollect, and opened up the subject of his claim against the Iron Mountain and Helena railroad, which at that time the St. Louis, Iron Mountain and Southern Railway Company had possession of and was operating, having acquired it by purchase in the fall of the preceding year. I asked Mr. Johnson what was the amount of his claim and he, in answer to my question, exhibited to me an agreed statement of account between himself and the Iron Mountain and Helena Railroad Company, by Wm. Bailey, president, which I have here and will attach a copy of same as an exhibit to my testimony, identifying it as Exhibit "A." The original I will return to Messrs. Dodge and Johnson, assistant at-

torneys of the St. Louis, Iron Mountain and Southern Railway
73 Company, to be held by them subject to the order of the court in this case. Mr. Notary, this is the original of the agreed statement of account as exhibited to me by Mr. Johnson. I identify it as such, and it fixes the amount of his claim against the Iron Mountain & Helena Railroad Company in the sum of twenty-five thousand dollars. I observed that this agreed statement of account confirmed the information which I had received before the purchase of this road in regard to Mr. Johnson's claim, and I did not think it proper to go behind this statement of account and did not interrogate him particularly in regard to the matter. Mr. Johnson expressed a desire to have this account paid; and inasmuch as the St. Louis, Iron Mountain and Southern Railway Company had fully paid for the purchase of this property, and it did not appear to my satisfaction that the same was a lien upon the property at that time,
I explained to him my desire that he would take the matter up
74 with Colonel Bailey, the president of the Kansas City and Southern Railway Company, from whom this railroad was acquired, and would effect an adjustment of the matter with him, inasmuch as Mr. Bailey was supplied with funds for this purpose.

6 Q. Why was Mr. Johnson's claim not settled at that time?

A. For the reason that, as I have before stated, the St. Louis, Iron Mountain and Southern Railway Company had fully paid the purchase price of this property to Mr. Bailey, president of the Kansas City and Southern Railway Company, and we held the receipts of that company for the full amount of the purchase-money, and it devolved upon him, under the express agreement of the Kansas City and Southern Railway Company, by William Bailey, president, to make settlement of all suits, claims, and demands of every nature whatsoever against the Iron Mountain and Helena Railroad Company.

75 7 Q. Was there any security or pledge taken from Mr. Bailey for the purpose of guaranteeing his compliance with that agreement?

A. There was.

8 Q. Please state if there was.

A. Contemporaneously with the payment of the purchase price of the road, as I have heretofore stated, we required Mr. Bailey to deposit with the Mercantile Trust Co. of New York, as trustee, forty-two of the general consolidated first-mortgage bonds of the St. Louis, Iron Mountain and Southern Railway Company of one thousand dollars each, as security for the performance of the obligation of the Kansas City and Southern Railway Company to pay all just claims and demands and settle all existing suits, liens, &c., against the Iron Mountain and Helena Railroad Company. That deposit was made in accordance with the terms of an instrument
the original of which is on file with the Mercantile Trust
76 Company, trustee. I have a copy here, which I will attach to my deposition, identifying same as Exhibit "B" to my testimony. The date of this instrument is November 27th, 1882, and it is signed by Mr Bailey, and recites the obligation of the

Kansas City and Southern Railway Company to do what I have just stated. We also, at a later period, succeeded in increasing the amount of this indemnity fund. Suits and claims continued to develop against the Iron Mountain and Helena Railroad Company, and they were suits and claims that neither I nor any other officer of the St. Louis, Iron Mountain and Southern Railway Company, so far as I know, ever had any knowledge of previous to the purchase of the Iron Mountain and Helena railroad by our company. We called upon Mr. Bailey to increase the amount of
77 this indemnity fund, and he did so by adding four other like bonds of the St. Louis, Iron Mountain and Southern Railway Company to the indemnity fund. I will state in this connection that the purchase price of this Iron Mountain and Helena railroad was paid by the St. Louis, Iron Mountain and Southern Railway Company in its general consolidated five per cent. bonds that I have just referred to. We also succeeded in increasing the indemnity fund by addition of the purchase price of some railroad iron and two flat cars, of the value of $5,765.00. These bonds which I have referred to as constituting our indemnity fund were later sold, and the whole fund amounted in cash to the sum of $52,617.50.

9 Q. Have you a statement showing that amount and also the amount of claims against the Iron Mountain and Helena Railroad Company?

78 A. I have and will attach same to my deposition, identifying it as Exhibit "C" to my testimony, showing the amount of the indemnity fund, $52,617.50, and the disbursements made by the St. Louis, Iron Mountain and Southern Railway Company in settlement with creditors of the Iron Mountain and Helena Railroad Company and in incidental litigation, that amount being $64,118.51. It will be observed from this statement that the indemnity fund was not sufficient to cover the disbursements of the St. Louis, Iron Mountain and Southern Railway Company in this connection. There was a deficiency of $11,501.09, which was paid by the St. Louis, Iron Mountain and Southern Railway Company.

10 Q. When Mr. Johnson produced the contract of settle-
79 ment which you have referred to and copy of which you have attached to your deposition as Exhibit "A," between himself and the Iron Mountain and Helena Railroad Company, did he make mention of any collateral or verbal agreement and understanding had between himself and the president of the Iron Mountain and Helena Railroad Company, by virtue of which the agreement had become a nullity?

A. He did not; on the contrary, all that was said by Mr. Johnson on the occasion of his visit to the general solicitor's office in Febr'y, 1883, was to the effect that this agreed statement of account represented what was due him as a fact from the Iron Mountain and Helena Railroad Company, and nothing was said on that occasion to in the slightest degree impair the conclusiveness of that statement upon both parties to it.

11 Q. When did you next meet Mr. A. H. Johnson?

A. To the best of my recollection, it was in the month of
80 April, 1883. That was after the judgment had been rendered in the United States district court for the eastern district of Arkansas, at Helena, in favor of Mr. Johnson, in the proceeding of forcible entry and detainer, the object of which was to get possession of eighteen miles of the Iron Mountain and Helena railroad built by him under his contract of construction.

12 Q. Was anything said on that occasion about this contract of settlement between himself and the Iron Mountain and Helena Railroad Company?

A. Nothing was said to impair its conclusions in the slightest degree; on the contrary, it was considered by our people at that time as an account stated between the parties to the memorandum, and was also so considered, I believe, by Major John J. Hornor, who accompanied Mr. Johnson to St. Louis as his counsel in the negotiations which followed. These negotiations were for an amicable settlement, if possible, of all contentions between Mr.
81 Johnson and the Iron Mountain and Helena Railroad Company. At the beginning of that conference I was present. It was in the general solicitor's private office. Gov. John C. Brown was then general solicitor. There were present Gov. John C. Brown, Major Jno. J. Hornor, and myself, and the question being broached as to what would satisfy Mr. Johnson, Major Hornor made a casual reference to this agreed statement of account as showing the amount which was really due Mr. Johnson, and thereupon proceeded to discuss a compromise.

13 Q. Who did Major Hornor represent on that occasion?

A. He represented Mr. A. H. Johnson, and, as I understood, the Arkansas Midland Railroad Company, which had a damage suit against the Iron Mountain and Helena Railroad Company at that time. Mr. Johnson was, I believe, the president of the Arkansas Midland Railroad Company. The purpose of the conference
82 was to settle not only this claim of Mr. Johnson's but the damage suit as well.

14 Q. Was any settlement effected at that conference?

A. There was none effected.

15 Q. What became of the damage suit, Mr. Merriam?

A. I, acting for the St. Louis, Iron Mountain and Southern Railway Company, compromised that damage suit with the Arkansas Midland Railroad Company on or about the 21st day of May, 1886, by payment of the sum of nine hundred dollars.

16 Q. Do you know of any other reference or correspondence having been made or had by Mr. Johnson or his counsel to this contract of settlement as a valid and subsisting agreement?

A. I do. After the failure of the conference in April, 1883, to reach any satisfactory result I believe there were no further communications between Mr. Johnson or his attorney and the St.
83 Louis, Iron Mountain and Southern Railway Company until about May 1st, 1883. On that date a short time remained for the St. Louis, Iron Mountain and Southern Railway Company to perfect its appeal from the judgment of the Federal court in the

forcible entry and detainer proceeding which I have before referred to. The company desired to avoid appealing that case to the Supreme Court of the United States, and accordingly Gov. Jno. C. Brown, then general solicitor, addressed a letter to Messrs. Tappan & Hornor, attorneys for Mr. A. H. Johnson, at Helena, Arkansas, in the following terms:

"Please advise me at your earliest convenience what is the lowest amount that will settle the claims of A. H. Johnson and the Arkansas Midland Railway Company in St. Louis, Iron Mountain and Southern 5 per cent. bonds."

I make a copy of that letter and will attach same to my depo-
84 sition as Exhibit "D;" the original I believe to be in the possession of Major Hornor. The original of the reply to that letter I have here, being dated from the office of Messrs. Tappan & Hornor, attorneys-at-law, Helena, Ark., May 17, 1883, in which I find a reference to the agreed statement of account already in evidence, as follows. I quote from the original letter, which I hold in my hand, referring to the agreed statement of account. The language is, meaning the debt at $25,000.00 on the 6th of October, 1881, as settled by the writing of Colonel Bailey; that reference we understood to be the agreed statement of account already in evidence. I will make a true copy of this letter an exhibit to my testimony, identifying the same as Exhibit "E," and will return the original to Messrs. Dodge & Johnson, assistant attorneys of the St. Louis,
85 Iron Mountain and Southern Railway Company, to be held by them subject to the order of the court in this case.

17 Q. Mr. Merriam, please state what effect, if any, had all these statements and representations of Mr. Johnson and his counsel in respect to his settlement with the Iron Mountain and Helena Railroad Company upon subsequent conduct of the St. Louis, Iron Mountain and Southern Railway Company and its officers in settling with other and unsecured creditors of the Iron Mountain and Helena Railroad Company.

A. The effect was this: We were induced by these statements and representations to believe that this agreed statement of account so frequently referred to by Mr. Johnson and his counsel was on each occasion a valid and subsisting agreement between the parties thereto. Accordingly we always reckoned the claim of Mr. Johnson at an amount not exceeding that stated in this agreement of account,
86 viz., $25,000.00. At the time these representations were made we had disbursed no portion of this indemnity fund of $52,617.50. We were induced to believe by these statements that it would be safe for the St. Louis, Iron Mountain and Southern Railway Company to compromise and settle the claims of unsecured creditors of the Iron Mountain and Helena railroad, and we acted upon that belief. The first disbursement made in settlement of such claims was on December 4th, 1883, and we continued to make such settlements for some years following from time to time, as occasion offered. Exhibit "C," already in evidence, shows, among other disbursements, such claims of unsecured creditors. I think it proper for me to indicate what of these claims were of unsecured creditors.

87 I understand them to be as follows, and as stated in the list: Friedman Brothers, John King, Ross & Myers, Jacks & Company, West & Mingo, Thwatt & Quarles, T. C. Hicks, Griffis & Trunkey, A. W. Wishard, assignee of Wood & Lee, W. N. Wilkerson, and Woollen, Webb & Co.: Horace R. Allen, Amos Woodruff, E. L. Thomas, Arkansas Midland Railroad Co., Citizens' National Bank of Oberlin (on account of A. H. Johnson, as I have understood), Sample Loftin, John S. Hornor & Son, Anchor Oil Company, H. B. Derrick, Tappan & Hornor, D. B. McKinzie, J. C. Barlow, Simon Seelig, J. W. Clopton, E. D. Bender, N. Strout, C. R. Coolidge, W. E. & C. L. Moore, John J. Coolidge & Sons, H. N. Pharr, and L. A. Fitzpatrick. Had we understood that this agreed statement of account was not conclusive
88 upon the parties to it, the St. Louis, Iron Mountain and Southern Railway Company could not have afforded to pursue the policy which it did with these unsecured creditors of the Iron Mountain and Helena Railroad Company. Mr. Bailey had failed to perform the agreement of the Kansas City and Southern Railway Company to settle with these creditors, and the result was that they must be either paid from the indemnity fund or their claims contested and paid not at all. We believed and still believe that we had a means in our own hands of avoiding the payment of these unsecured creditors. The means were as follows: The first-mortgage bonds of the Iron Mountain and Helena Railroad Company, from one to three hundred and thirty-six inclusive, of one thousand dollars each, were in the hands of your company as *bona fide* holders for value, and the interest was in default
89 on these bonds. We could have resorted to a foreclosure proceeding upon these bonds, and we believed that the property would not have realized at foreclosure sale the amount of the principal of those bonds and the interest in default. We did not pursue that course because we felt that Mr. Johnson's claim, being no more than as shown by the agreed statement of account, we could afford to compromise and settle with these unsecured creditors, if they were willing to do so upon reasonable terms, which they uniformly did; and that was the course pursued by the St. Louis, Iron Mountain and Southern Railway Company in winding up all of this Iron Mountain and Helena litigation, and pursued because we believed the course was safe and would not result in loss to the company on final settlement with Mr. Johnson.

90 18 Q. Please state when and how you first learned that Mr. Johnson had changed his mind about the said statement of account and claimed that the same was a nullity.

A. The first time I heard anything to impeach the conclusiveness of this memorandum, Exhibit A, was in the month of January, 1887, after the judgment of the United States court at Helena for possession in favor of Mr. Johnson had been affirmed by the decision of the Supreme Court of the United States. It was only then and for the first time during this long series of negotiations that I heard anything to impeach the conclusiveness of that memorandum. I learned it through Messrs. Dodge & Johnson one of their firm having had a conversation the previous week with Mr.

A. H. Johnson on a railroad train, in which he for the first
91 time, to my knowledge, declared that the agreed statement of account, Exhibit A, was a nullity by reason of certain alleged verbal conditions not having been performed at the time that agreed statement of account was made between the parties.

19 Q. Did you at any time after that hear Mr. Johnson himself say anything about it?

A. I did.

20 Q. State when and where.

A. In the following month of February, 1887, I went to Helena, Arkansas, in company with Col. George E. Dodge, one of the assistant attorneys of the St. Louis, Iron Mountain and Southern Railway Company, for the purpose of effecting, if possible, a settlement with Mr. Johnson in view of the fact that the decision had been finally affirmed by the Supreme Court of the United States, and on that occasion Mr. Johnson stated positively and in substance what I had only a few weeks previously learned from Messrs. Dodge &
92 Johnson, that the memorandum agreement of account was not a valid and subsisting agreement, but had been for a long time treated by him as a nullity.

21 Q. Was all that you have stated about Mr. Johnson claiming that that contract of settlement was a nullity before or after the various unsecured claims were paid?

A. It was long after, as will be seen by reference to Exhibit C to my testimony, showing the dates upon which these payments were made, as before stated by me. We had at that time settled with every unsecured creditor of the Iron Mountain & Helena Railroad Company and held none of the indemnity fund which we did not afterwards pay into the registry of the court in satisfaction of Mr. Johnson's claim and in payment of the costs of court in the forcible entry and detainer proceeding, as will be seen by reference to Exhibit C to my testimony.

22 Q. Did you have another interview with Mr. Johnson
93 in August, 1887, at Helena, Arkansas?

A. I did.

23 Q. Please state fully what passed between Mr. Johnson and yourself at that time.

A. I arrived at Helena on or about the 23d day of August, 1887, for the purpose of making a final effort to settle with Mr. Johnson, and on this occasion I met Mr. Johnson himself and Maj. John J. Hornor, his counsel. Col. George E. Dodge, of the legal department of the St. Louis, Iron Mountain and Southern Railway Company, was also present with me to co-operate with me in the business. I made every possible effort to effect a settlement with Mr. Johnson, and I had what I believed to be the full amount in cash of the utmost dollar of Mr. Johnson's claim. The amount which I finally tendered to him I did tender for the purpose of being on the safe side and giving
94 his claim the most liberal construction possible. The negotiations were conducted at the office of Mr. Johnson, in the Arkansas Midland depot building, at Helena, and also in the office of Major Jno. J. Hornor, his counsel, at Helena. I endeavored to effect a settle-

ment for a less sum than I finally tendered him. Finding that this could not be done and that Mr. Johnson claimed a sum largely in excess of what we believed to be due him under the most liberal construction of his contract, I finally tendered to him or offered to tender to him the sum of $25,000.00 and interest on this amount from October 6th, 1881, the date of the agreed statement of account, to August 23d, 1887, the date of the tender. I had with me in United States legal-tender notes the even sum of $34,000.00. The bills were large and I did not have the exact change to tender to Mr. Johnson, but both he and his counsel waived that and admitted that I had made the
95 tender which our construction of the contract would require. Mr. Johnson refused this tender, and thereupon the negotiations ended without any result, and Colonel Dodge and myself proceeded to go before Honorable Henry C. Caldwell, judge of the United States district court for the eastern district of Arkansas, at Helena, for the purpose of obtaining a restraining order to prohibit Mr. Johnson from in any manner interfering with the possession of the 18 miles of road in controversy. Col. Dodge read the petition to Judge Caldwell, and I showed him the money which I had tendered to Mr. Johnson, and thereupon the restraining order was granted, conditioned that we deposit the amount which we admitted to be due in the registry of the court, subject to Mr. Johnson's draft, which was done, and the restraining order was granted.

96 24 Q. Is that all that you have had to do with the matter?

A. I have had a great deal to do with the matter, but think I have stated all that is material to this controversy.

Cross-examination by Col. JOHN J. HORNOR:

1 Q. Mr. Merriam, at the time you made this tender in August, 1887, did not Mr. Dodge, your colleague, request that I should take no proceedings to take possession of the road until you had an opportunity to apply to Judge Caldwell for an injunction?

A. I cannot be positive upon that point. It is possible that he did so. I remember, however, one circumstance very distinctly, and that was, Major Hornor, your assurance that we would not get the restraining order which we did.

97 2 Q. Mr. Merriam, you say that you went to Helena in Febr'y, 1887?

A. Yes, sir.

3 Q. Have you any data here by which you can refresh your recollection as to the month you went there in?

A. To the best of my recollection, it was in February, 1887. I know this: It was after the affirmance of the judgement by the United States Supreme Court, and that was in January, 1887.

4 Q. Mr. Merriam, state whether or not there was filed in the United States district court, at Helena, Arkansas, a bill by the unsecured creditors whom you have named, except Friedman Brothers and John King, for the purpose of enforcing the judgements held by them against the Iron Mountain and Helena railroad against the St. Louis, Iron Mountain and Southern Railway Company.

A. There was such a bill filed by A. W. Wishand and other creditors standing in the same category as himself. I believe
98 that all of the parties whom I have named were not parties to that bill, although a considerable number, perhaps most of them, were.

5 Q. Had not the issues in that cause been formed in the proof taken before this compromise was made?

A. The complainants had taken proof, although the respondents had not.

5½ Q. Had not the St. Louis, Iron Mountain and Southern Railway Company filed its answer in that cause?

A. They had.

6 Q. Did you prepare the answer?

A. I assisted in the preparation of it.

7 Q. Was not the purpose and object of that bill to enforce a lien as against the property acquired from the Iron Mountain and Helena Railroad Company by the St. Louis, Iron Mountain and Southern Railway Company for the payment of their debts?

99 A. I think the purpose of the bill was to set aside the sale of the road. It was an ordinary creditor's bill. It is a matter of record in the same court in which this suit is pending.

8 Q. Were not the propositions for a compromise made by you as the representative of the St. Louis, Iron Mountain and Southern Railway Company?

A. They were.

9 Q. Did you not urge upon these creditors, as a means of obtaining a favorable compromise, that the St. Louis, Iron Mountain and Southern Railway Company did not have in their hands indemnity sufficient to meet the liabilities which were liens upon that road and the amount offered by you in payment of these debts?

A. These creditors did not require much urging on my part to accept the compromise, and, as a matter of business prudence, I do not think I did very strongly urge the acceptance of the com-
100 promise. I may have stated to the creditors that the St. Louis, Iron Mountain and Southern Railway Company could not afford to pay their claims in full, but could pay a certain proportion for the purpose of compromising the litigation and giving them a fair *pro rata* all around. The creditors were desirous of the settlement, and ever since the sale of the road had been constantly importuning myself, as the representative of the St. Louis, Iron Mountain and Southern Railway Company, and other of its officers, to make some kind of settlement of their claims.

10 Q. State, if you please, the attorneys who represented the largest amount of their creditors—the attorneys of record.

A. I believe it was your firm of Tappan & Hornor. There were other attorneys of record, besides your firm, as I recollect,
101 representing no inconsiderable amount of these claims.

11 Q. Please state the creditors who have importuned you to settle with them. Give their names, if you can.

A. First of all I think Messrs. Thwatt & Quarles, early after the transfer of the Iron Mountain and Helena railroad to our company,

wrote to Governor Jno. C. Brown, then general solicitor, in a friendly way suggesting compromise and settlement with a considerable number of their clients who held freight certificates of the Iron Mountain and Helena railroad and other claims possibly against that company. Then, later, Mr. A. W. Wishard, an attorney, of Indianapolis, Indiana, who appears in Exhibit C as assignee of the several parties therein named, had frequent interviews with the general solicitor and myself, and I think, too, with Judge T. J. Portis, the general attorney of the St. Louis, Iron Mountain
102 and Southern Railway Company, with a view to the settlement of claims represented by him. Mr. Wishard, I believe, owned a very considerable portion of the claims sued on in that creditor's bill.

12 Q. Were not the letters of Messrs. Thwatt & Quarles referred to by you written before the recovery of judgments on their claims?

A. That is my recollection. Some years have since elapsed and I cannot pretend to state the fact with that precision that I can some other facts better fixed in my mind.

13 Q. Were not these gentlemen, then, last to come into the compromise?

A. They were, but through no importunity of mine. They voluntarily notified me through S. I. Clark, clerk of the United States court at Helena, that they would be pleased to accept the
103 terms which had been satisfactory to the other creditors in the same class at Helena. From first to last I think I had no conference with Judge Thweatt on the subject and I had none with Mr. Quarles.

14 Q. When and where did you obtain the paper marked Exhibit "A?"

A. That paper was sent to me a few days since by mail from the office of Dodge and Johnson, assistant attorneys of the St. Louis, Iron Mountain and Southern Railway Company, at Little Rock, Arkansas. It has been, I believe, in their possession since the occasion of our visit to Helena, as I have before stated, in or about the month of Febr'y, 1887.

15 Q. Do you know of your own knowledge where and upon whose information they obtained that paper?

A. I remarked to Mr. A. H. Johnson, on the occasion of that visit, that he had exhibited to me, in February, 1883, this agreed
104 statement of account—that is to say, the original paper. I distinctly remembered its contents and its appearance and described it to him and asked him where it, that paper, now was. Either Mr. A. H. Johnson or Major Hornor stated to Mr. Dodge that the paper was not in their possession at that time, but would probably be found in the files of the case of A. H. Johnston against The Iron Mountain & Helena Railroad Company *et al.*, the forcible entry and detainer proceeding, which was tried in Judge Caldwell's court, at the March term, 1883, and was used in evidence by Mr. A. H. Johnson's counsel on that occasion.

16 Q. Mr. Merriam, you speak about the first mortgage executed by the Iron Mountain and Helena Railroad Company, and that

you were the holders of the bonds. Do you or do you not know as a fact that that mortgage was no lien as against the rail-
105 road company on account of a defect in the acknowledgment.

A. Originally, I believe, there was an illegal defect in that mortgage, but that was later cured and the mortgage again recorded.

17 Q. You speak about an interview here in April, 1883, in regard to this matter, in the office of Governor Brown, the general solicitor: do you know at whose instance Mr. A. H. Johnson came here and for what purpose?

A. I cannot now say at whose instance Mr. Johnson came here. The purpose of his coming was to effect a settlement of his litigation with the Iron Mountain and Helena Railroad Company and the St. Louis, Iron Mountain and Southern Railway Company.

18 Q. You state that prior to the 15th day of December, 1882, you were employed specially in regard to the acquisition of the Iron Mountain and Helena railroad?

A. I was.

106 19 Q. Do you know when the transfer of that property was made—that is, when the St. Louis, Iron Mountain and Southern Railway Company took possession?

A. December 15th, 1882, was, I believe, the date.

20 Q. You state that you learned that A. H. Johnson had a claim and its amount. From whom did you learn that?

A. From Mr. William Bailey, at the time president of the Kansas City and Southern and the Iron Mountain and Helena Railroad Companies.

21 Q. Did you know then that there was a suit pending in regard to the amount of that claim; and, if so, where?

A. I understood that there was a suit pending in the United States court at Helena.

22 Q. From whom did you learn that?

A. From Mr. Bailey and from the clerk of the court, Mr. S. F. Clark.

107 23 Q. Did you know the nature of that suit?

A. I did not fully investigate it because I was informed very positively by Mr. Bailey that he had effected an arrangement with Mr. Johnson for a compromise, not only of that suit but of the Arkansas Midland suit, by payment of a sum in cash, and that as soon as the St. Louis, Iron Mountain and Southern Railway Company paid the purchase price for the Iron Mountain and Helena railroad he would use a portion of the funds received on that sale in settlement with Mr. Johnson.

24 Q. Did you at that time know that the contract between Mr. Johnson and the Iron Mountain and Helena railroad was recorded?

A. I cannot positively say whether I saw that of record or not. I did not give this suit the consideration which I otherwise would, owing to the very positive statements of Mr. Bailey that
108 the matter had been amicably agreed to be adjusted by a cash payment as soon as Mr. Bailey had the funds, which he would get from a sale of the Iron Mountain and Helena railroad.

There was nothing equivocal about Mr. Bailey's statement in regard to his alleged arrangement with Mr. Johnson. It was positive and unqualified that when he had the money in hand the matter would be immediately disposed of.

25 Q. Did you understand from him that this suit was to determine the amount due?

A. I did not.

26 Q. What did you understand to be the character of the suit?

A. I did not investigate the character of the suit for the reasons I have before stated. I did not deem it material to do so.

EDWIN G. MERRIAM.

109 EXHIBIT "A."

Copy.

It is agreed between A. H. Johnson and the Iron Mountain and Helena Railroad Company as follows, viz: That the amount due said Johnson for constructing that part of said Iron Mountain and Helena Railroad between the former junction with the Arkansas Midland railroad and the town of Marianna under a contract executed in April, 1879, is the sum of $25,000 at this date; and it is further agreed that the suit now pending in the United States district court for the eastern district of Arkansas, at Helena is to be continued at the October term, A. D. 1881.

(Signed) IRON M'T'N AND HELENA R. R. CO.,
Per WM. BAILEY, *Pres't.*
A. H. JOHNSON.

Exhibit "A." M. F. Watts, notary public.

110 EXHIBIT B.

Copy.

ST. LOUIS, *November* 27, 1882.

Whereas by the terms of an agreement made and entered into on the 27th day of September, A. D. 1882, by and between the undersigned, with others, and the St. Louis, Iron Mountain & Southern Railway Company, it was agreed that the Iron Mountain & Helena railroad, a railroad extending from the town of Forrest City, in the county of St. Francis, State of Arkansas, southwardly through the counties of St. Francis, Lee, and Phillips to the city of Helena, in said county of Phillips and said State, should, with other property, be sold and conveyed to the St. Louis, Iron Mountain & Southern Railway Company for the sum of four hundred and fifty thousand dollars:

111 And whereas it was agreed that said property should be sold and conveyed, as aforesaid, free from liability for all judgments, suits, claims, and liens;

And whereas the said railroad and property has been sold and

conveyed as aforesaid, and the St. Louis, Iron Mountain & Southern Railway Company has paid the consideration therefor:

Now, therefore, the undersigned herewith deposits with the Mercantile Trust Company of New York City forty-two (42) of the consolidated five per cent. bonds of the St. Louis, Iron Mountain & Southern Railway Company, to be held by the said Mercantile Trust Company in trust and as security that he will discharge and satisfy all judgments and liens, and will defend and save harmless the St. Louis, Iron Mountain & Southern Railway Company against all suits and claims which may be enforced against the rail-
112 road and property so sold; and the undersigned hereby authorizes, in his place and stead, R. S. Hays, the first vice-president of the St. Louis, Iron Mountain and Southern Railway Company, to pay off and discharge any and all judgments and liens and to compromise and satisfy any — all suits and claims as aforesaid; and in default of repayment by the undersigned to the said R. S. Hays, within six months of *of* the date hereof, of all sums of money expended by R. S. Hays, as aforesaid, the said Mercantile Trust Company is hereby authorized, upon the order of the said R. S. Hays, to sell and dispose of, at the highest market rate, so many of said bonds as may be necessary to reimburse the said R. S. Hays for money paid for the purposes aforesaid and for interest thereon at the rate of six per cent. per annum from the date of each disbursement, the balance of the forty-two bonds aforesaid to be returned to the undersigned.

113 (Signed) WM. BAILEY.

Exhibit "B," page 2. M. F. Watts, N. P.

EXHIBIT "C."

Indemnity fund for protection of St. L., I. M. & S. R'y Co. on account of suits, claims, and demands against I. M. & H. R. R. Co.

1883.		
Mar. —.	Proceeds of sale of railroad iron and two flat cars	$5,765 00
Nov. 30.	Proceeds of sale of 11 Iron Mountain 5 per cent. mortgage bonds and matured coupons	8,566 25
1886.		
Mar. —.	Proceeds of sale of 35 Iron Mountain 5 per cent. mortgage bonds and matured coupons	38,286 25
	Total	$52,617 50

Disbursements in Settlement with Creditors of I. M. & H. R. R. Co. and Incidental Litigation.

114

1883.			
Dec.	4.	Paid Friedman Bro's	$3,500 00
"	"	" John King	130 00

1883.				
Dec.	4.	Paid	Ross & Myers	$89 50
"	"	"	Jacks & Co.	135 00
"	"	"	West & Mingo	66 00
"	"	"	Thwatt & Quades	400 00
"	"	"	T. C. Hicks (on acc't)	300 00
"	"	"	Griffis & Trunkey	225 00
1884.				
Jan'y	31.	"	John C. Webb	2,000 00
May	31.	"	Wm. Bailey, to apply on settlement with trustees under first mortgage I. M. & H. R. R. Co. and other creditors	800 00
Oct.	31.	"	A. W. Wishard, assignee, on account, through Wm. Bailey	600 00
1885.				
Mar.	31.	"	judgment and costs in suit R. L. Stousell *vs.* I. M. & H. R. R. Co.	337 69
Oct.	31.	"	State treasurer of Arkansas arrears of taxes on terminal grounds at Helena	206 94
1866.				
Feb'y	28.	"	Boyle, Adams & McKeighan, att'ys, their fee and costs in case of Com'l Bank *vs.* Baily & Green	122 35
"	"	"	judgment, interest, and costs in said case	1,585 63
115				
"	"	"	J. H. McKenney, clerk, &c., for printing record and clerk's fees in case of I. M. & H. R. R. Co. *et als. vs.* A. H. Johnson, in Supreme Court of United States	115 00
Mar.	31.	"	S. I. Clark, clerk fees	1 75
April	8.	"	A. W. Wishard, assignee of Wood & Lee and W. N. Wilkerson	4,500 00
"	"	"	A. W. Wishard, assignee of Woollen, Webb & Co.	1,500 00
"	"	"	Horace R. Allen	3,035 00
"	21.	"	Amos Woodruff, through Messrs Tappan & Hornor	1,100 00
"	21.	"	S. I. Clark, clerk fees	6 00
May	15.	"	Parham & Ruth, acc't right of way	114 10
			Forward	$20,869 96

Exhibit "C," page 2. F. M. Watts, N. P.

			Bro't forward	$20,869 96
1886.				
May	20.	Paid	T. C. Hicks, through Stephenson & Frisbee, in full	460 00
"	21.	"	E. L. Thomas on sundry claims	1,500 00

116

1886.				
May	21.	Paid	Arkansas Midland R. R. Co.	$900 00
"	"	"	Citizens' Nat'l Bank of Oberlin (acc't A. H. Johnson)	693 87
"	"	"	Sample Loftin	649 46
"	"	"	John S. Homer & Son	88 88
"	"	"	Anchor Oil Co.	55 12
"	"	"	H. B. Derrick	316 10
"	"	"	Tappan & Hornor	101 38
"	"	"	S. I. Clark, clerk's fees	4 50
"	"	"	A. W. Wishard, expenditures, &c.	36 20
June	—.	"	D. B. McKinzie	47 50
"	"	"	J. C. Barlow	35 00
"	"	"	Simon Seelig	94 37
"	"	"	J. W. Clopton	106 25
"	"	"	E. D. Bender	32 12
"	"	"	N. Stroub	125 00
"	"	"	C. R. Coolidge	230 00
"	"	"	W. E. & C. L. Moore	149 14
"	"	"	Jno. K. Coolidge & Son	42 50
"	"	"	H. N. Pharr	329 33
"	"	"	Twratt & Quades for recorder's fees in connection with settlements	22 75
Aug.	3.	"	S. I. Clark, clerk	29 40
Nov.	30.	"	Britton & Gray, att'ys-at-law, Washington, D. C., for services rendered in case of I. M. & H. R. R. Co. *vs.* A. H. Johnson, in U. S. Supreme Court	50 00
117				
Dec.	—.	"	costs in suit of Arkansas Midland R. R. Co., L. A. Tiptuck, & E. L. Thomas	16 40
1887.				
Jan'y	18.	"	J. H. & L. E. B. Ocunn and T. L. Biscoe, in settlement of suit relative to terminal property at Helena	2,286 65
Ju.	20.	Certified copy of decision of U. S. Sup. Ct, Johnson *et* o's		2 00
Mar.	31.	Paid Mrs. L. P. Williamson, damages in ejectment suit		305 95
July	5.	"	Mrs. L. P. Williamson for value of right of way through her premises	717 45
		Forward		$30,237 29

Exhibit "C," page 3. M. F. Watts, N. P.

		Bro't forward		30,237 29
1887.				
Aug.	25.	Paid into registry of U. S. court for A. H. Johnson		33,825 00

1887.
Aug. 25. Paid clerk's costs U. S. dist. court, E. D. Ark., at Helena, in case of H. H. Johnson
118 *vs.* Iron Mountain & Helena R. R. Co. *et als.*, forcible entry and detainer 856 30

Total disbursements 64,118 59

Recapitulation.

Total expenditures $64,118 59
" indemnity 52,617 50

Deficiency paid by St. L., I. M. & S. R'y Co. $11,501 09

Exhibit "C," page 4. M. F. Watts, N. P.

EXHIBIT D.

Copy.

The Missouri Pacific Railway Co., Office of General Solicitor.

ST. LOUIS, *May* 1*st*, 1883.

Messrs. Tappan & Hornor, attorneys-at-law, Helena, Ark.

DEAR SIR: Please advise me at your earliest convenience
119 what is the lowest amount that will settle the claims of A. H. Johnson and of the Arkansas Midland Railway Co. in St. Louis, Iron Mountain & Southern five per cent. bonds.

Y'rs very truly,
(Signed) JNO. C. BROWN.

Exhibit D. M. F. Watts, N. P.

EXHIBIT "E."

Copy.

J. C. Tappan. J. J. Hornor.

Office of Tappan & Hornor, Attorneys-at-Law.

HELENA, ARK., *May* 17, 1883.

Hon. Jno. C. Brown, St. Louis, Mo.

DEAR SIR: The writer of this, our Mr. Hornor, has been absent attending court in Lee county for several days. On his return yesterday he found Mr. A. H. Johnson's letter to him in
120 regard to the proposition to settle his claim against the I. M. & H. R. R. Co. in Iron Mountain & So. 5 per cent. bonds.

Mr. Johnson writes that he is willing, if settlement is made now, to "figure the debt and interest to date of settlement and receive Iron Mountain 5 % at market price, whatever that might be at the time of settlement," meaning the debt at $25,000, on the 6th of October, 1881, as settled by the writing of Col. Bailey. We regret

that Mr. Johnson did not write directly to you, as this delay would thereby have been prevented. We presume, however, that this will make no difference now, as the appeal has been perfected. Mr. Johnson has not been in Helena since you met him in St. Louis.

Y'rs very respectfully,
(S'gn'd) TAPPAN & HORNOR.

Exhibit "E." M. F. Watts, N. P.

121 Endorsed: Filed Feb'y 26, 1888. Samuel I. Clark, clerk.

Notice to Take Depositions.

In the United States District Court for Eastern Division of Eastern District Arkansas.

THE ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY, Plaintiff,
vs.
A. H. JOHNSON, Defendant.

To the St. Louis, Iron Mountain & Southern Railway Co., the above-named plaintiff:

You are hereby notified that depositions of witnesses, to be read in evidence in the above-entitled cause on the part of the defendant, will be taken at the office of Jno. J. & E. C. Hornor, in the city of Helena, in the county of Phillips, State of Arkansas, on the 22d day of February, A. D. 1888, between the hours of eight o'clock in the forenoon and six o'clock in the afternoon, and that the taking of the said depositions, if not completed on that day, will be continued from day to day, at the same place and between the same hours, until completed.

122–124

JNO. J. & E. C. HORNOR,
Attorneys for Def't Johnson.

I served the above notice on this day, in my county, by handing a true copy thereof to Mr. Kilpatrick, agent of said road, at Helena, Ark.

Witness my hand and seal this the 4 day of Feb'y, A. D. 1888.
Fees, $1.00.

THOS. FLETCHER, *U. S. M.*,
By S. W. TAPPAN, *D. U. S. M.*

Endorsed: Filed before taking of depositions this 22d day of February, A. D. 1888. Norman H. Randall, notary public.

125 *Notice to Take Depositions.*

The United States District Court for the Eastern Division of the Eastern District of Arkansas.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY, Plaintiff,
vs.
A. H. JOHNSON, Defendant.

To St. Louis, Iron Mountain & Southern Railway Company, the above-named plaintiff:

You are hereby notified that depositions of witnesses to be read in evidence in the above-entitled cause on the part of the defendant will be taken at the office of J. J. & E. C. Hornor, in the city of Helena, in the county of Phillips, State of Arkansas, on the 29th day of February, A. D. 1888, between the hours of eight o'clock in the forenoon and six o'clock in the afternoon, and that the taking of the said depositions, if not completed on that day, will be
126 continued from day to day, at the same place and between the same hours, until completed.

J. J. & E. C. HORNOR,
Attorneys for Defendant.

I served the above notice on this day, in my county, by handing a true copy thereof to E. J. Kilpatrick, ag't of the above railroad at Helena.

Witness my hand this 25 day of February, A. D. 1888.

THOS. FLETCHER,
U. S. Marshal,
By S. W. TAPPAN, *D. U. S. M.*

P'd 1.00, marshal fees.
P'd by def't.

Endorsed: Filed before taking of depositions this 29th day of February, A. D. 1888.

NORMAN H. RANDALL,
Notary Public.

Telegram.

From LITTLE ROCK, *Feb'y*, 1888.

To J. J. & E. C. Hornor, Helena:

127 Will accept notice to take your deposition on 29th. Understood that if we think necessary to take that of our Mr. Dodge it may be done between now and first day of court. Will you take deposition at Memphis, Tennessee?

DODGE & JOHNSON.

In United States District Court for Eastern Division of Eastern District, Arkansas.

THE ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY, Plaintiff,
vs.
A. H. JOHNSON, Defendant.

Depositions of witnesses taken and subscribed before me, Norman H. Randall, an acting and duly commissioned notary public in and for the county of Phillips, in the State of Arkansas, on the 22nd day of February, A. D. 1888, between the hours of eight o'clock a. m. and six o'clock p. m. of said day, at the office of John J. and E. C. Hornor, in the city of Helena, in the county of Phillips, in
128 the State of Arkansas, in pursuance of the notice hereto annexed, and to be read as evidence in a certain cause now pending in the United States district court for eastern division of eastern district, Arkansas, wherein the St. Louis, Iron Mountain & Southern Railway Company is plaintiff and A. H. Johnson, defendant, on the part of defendant.

A. H. JOHNSON, a witness known to me to be of lawful age, being to me at the time and place aforesaid produced and being by me first duly sworn to testify the truth, the whole truth, and nothing but the truth in regard to the matters in controversy in the action aforesaid, did then and there on his oath aforesaid depose as follows, to wit:

Direct examination by Maj. J. J. HORNOR.

129 1. State whether you are a party to this suit.

A. I believe I am defendant.

2. State whether you are the same A. H. Johnson who made a contract to build part of the Iron Mountain and Helena railway.

A. I am.

3. State whether you filed answer to the bill of complaint in this cause.

A. I filed an answer through my attorney.

4. Was the answer read to you and are you familiar with its contents?

A. It was by me, and I am somewhat familiar with its contents.

5. State whether the facts set forth in that answer are true or not.

A. They are true, I believe.

6. There is filed with the bill in this case a copy of a paper
130 signed by you and also the Iron Mountain & Helena Railway Company, or rather a certain paper is copied into the bill, which paper purports to be a settlement and fixing of the amount due you for the construction of that portion of the Iron Mountain & Helena railway between its junction with the Arkansas Midland R. R. and the town of Marianna at the sum of $25,000. Please state whether such paper was ever executed and delivered by you; and, if so, all the facts and circumstances attending the making and signing of the paper.

A. At the request of Mr. William Bailey, president of the Iron Mountain & Helena R. R., I went with him to Maj. Hornor's office. He then said that he desired to have my suit against the Iron Mountain & Helena R. R. continued to the next term of
131 court, and said that if I would agree upon a certain amount I would take he would either get me the money within 30 days or would put up such security as would guarantee the payment to me. I objected to signing any writing, but finally signed this paper set forth in this bill with the understanding that I was to keep it in my possession, and I may have left it with Major Hornor, but if I did it was understood that it was to remain in my possession, and if he failed to make his promise good within 30 days in regard to this security, then it was to be null and void. That is my understanding.

7. Did William Bailey or the Iron Mountain & Helena Railway Company pay you the amount or furnish you the securities mentioned?

A. They did not pay me any money or furnish any securities nor make any report during that month or any succeeding time that I remember.

8. Did they pay you any money or furnish you any se-
132 curities for money at any time?

A. Never at any time.

9. Did William Bailey or the Iron Mountain & Helena Railway Company at any time after the signing of this paper claim or hold that the amount due you for the construction of the part of the road built by you was fixed by this paper?

A. No, they never did.

10. Did you at any time subsequent to that have any conversation with William Bailey in regard to the amount due you or he with you? If so, state when, where, and what they were if you recollect.

A. I only recollect one circumstance in St. Louis. Some time after that Mr. Bailey told me that he had been trying to get the Iron Mountain R. R. and Wm. Hayes to pay my claim or some
133 part of it, but that my visits to Mr. Hayes' office had put it out of his power, and that he couldn't do anything for me.

11. Did he at any time that you remember state what amount he considered due you under the contract?

A. He never stated to me. I heard of his statements to others; but he never stated to me that he considered anything less than the face of the contract due me.

12. Did you, subsequent to this time, ever have any conversation with him on the subject of the contract?

A. I may have had, but I do not recollect it; nothing that amounted to anything; had no results in any way.

13. When did this paper go out of your possession?

A. When my case was tried before a jury—a forcible entry and detainer suit—my attorney, I think, brought it into court to
134 prove that Mr. Bailey had acknowledged that there was a greater sum due me than he then claimed.

14. Do you know when and how it went into the possession of the plaintiff in this suit?

A. My recollection is that when we were talking about a settlement—I think it was in January, 1887—in some way it was discussed by my attorney. Mr. Merriam asked where that paper was, and my attorney told him that it was in the office of S. I. Clark, clerk of the United States court. Mr. Merriam told Maj. Hornor the next day that he had found it, but that it was not on file. That was in my presence, I believe.

15. State whether at any time you ever agreed to accept in payment of the contract you had with the Iron Mountain and Helena Railway Company for the construction of the road to Mari-
135 anna any sum less than the amount due as expressed by that contract, except as a compromise, to be paid then or within a stipulated time.

A. I never agreed to accept anything, except upon two occasions by the advice of my attorney: one was when I signed this paper with Bailey in Hornor's office, as I have stated, and the other by the advice of my attorney in St. Louis, he offering to take $21,000 of Gov. Brown. I think I was not present when he did so, but it was with my consent that he made the offer, which, I understood, was refused by Gov. Brown. I never agreed upon any amount that I would receive except upon these two occasions, or at any time except as a compromise to be paid upon the spot or within a specified time.

16. State how the Midland road was situated, as to the Iron
136 Mountain & Helena railway, at the point where the work of construction by you commenced. Were they adjoining or connected in any way? How were they situated relative to each other eight miles west of Helena? How was the Iron Mountain & Helena railway with reference to the Midland as it was surveyed and laid out?

A. At the 8-mile post on the Arkansas Midland road they were within a mile of each other. They did not join.

17. Then, to construct the Iron Mountain & Helena R. R. to Marianna and join it with the Midland road did you not have to depart from the line of the Iron Mountain?

A. Yes. The old survey of the Iron Mountain & Helena R. R. was left out from eight miles out into Helena. We simply bridged across this mile and then got on the old grade and constructed the road from the mile post to Marianna.

137 18. Then when you were dispossessed of the Iron Mountain & Helena R. R. what became of the road that was built between the Iron Mountain & Helena and the Midland to make the connection?

A. The Iron Mountain & Helena obtained this mile of connection across there and built on their own, the old grade, into Helena. They built that part out eight miles before they took possession and then abandoned this mile. They tore up the iron and took away the track. They left the grade, which is partly obliterated.

19. After the decision in the Supreme Court of the United States

did you take any action preparatory to repossessing yourself of that portion of the road from which you had been dispossessed by the action of the Iron Mountain authorities? What were you required to do?

A. In the first place, the grade had been changed to stand-
138 ard 4 ft. 8½ in. on the Iron Mountain part; 3 ft. 6 inches was the grade I constructed it. I proceeded to change the gauge of the Midland to standard gauge. After that was completed I prepared to build across this mile and connect, as I understood that the decision of the Supreme Court contemplated my operating the road just as I had previously, and I thought that to take possession of the road without being able to operate it would interfere with the convenience of the traveling public. I thought it would not be in accordance with the spirit of the decision of the Supreme Court, as I understood it. I was present when the case was argued. I heard Chief Justice Waite say to the attorney that it was presumed that I was running it for the convenience of the traveling public before I was dispossessed, and it was presumed that if I was given possession again I would proceed to operate the road for the con-
139 venience of the public. In accordance with that, I thought it proper for me to make that connection and be prepared to operate the road before I took possession under this ruling of the Supreme Court.

20. What did you do in regard to making this connection? What steps did you take?

A. I bought some steel rails, enough to lay across the mile, and contracted for ties; a good part of them were delivered on the ground; had the right of way cleared off and started with the track; had completed the track about 100 feet; don't remember exactly how far; part of the rails were delivered.

21. Was it necessary for this work to be done before you could operate the road?

A. It was.

22. What was the cost to you of this work that was done in making preparations for the building of this road?

140 A. I went to $2,000 or $3,000 expense, but I utilized the most of it afterwards on the Midland road.

23. Did that use of materials upon the Midland road repay you for the expense incurred in and about this work?

A. It did not.

24. What was the difference?

A. I should say that the expense incurred in starting to build this connection across one mile was about $1,000 more than I got back from it by using the material on the Midland road.

25. Were you engaged in preparing to build this road at the time the injunction was served on you in this case?

A. I was; was stopped by the injunction in the act of building.

26. At the time you entered into the contract for the building of that portion of the Iron Mountain & Helena R. R. before spoken of who was the owner of the Midland R. R.?

A. I was the owner.

141 27. By whom was the road being operated?

A. I was operating the Midland road.

28. State whether there was any consideration moving you to enter into the contract for the construction of the road other than the amount expressed in the contract; and, if so, what.

A. When I contemplated the building of this 18 miles of road for the Helena and Iron Mountain R. R. I consulted with my attorney, Maj. Hornor, and he advised me that it would not pay to go into it, saying that it was doubtful if I would get my pay. I told him that if he could draw a contract that would give me possession until I was paid I could afford to do the work and wait, for it would be a valuable feeder to the Midland road, and I could make more out of it in that way than I would get for the building of it.

29. By the terms of the contract did you have the right to

142 possess the road and use and operate it until paid?

A. I did.

30. How was the road to be operated? Did the Iron Mountain and Helena possess any rolling stock?

A. The Iron Mountain & Helena railway had no rolling stock. They furnished nothing but the iron and fastenings. I was to operate the road with rolling stock belonging to the Midland, of which I had a surplus. I had plenty to operate it, and I understood that I was not to account for the proceeds in any way.

31. You say that the Midland road had a surplus of rolling stock. Did it have any terminal facilities that were of value in operating the road?

A. It had full terminal facilities in Helena for all the business that I could do on both roads.

32. What experience have you had in railroad business?

143 A. 16 years.

33. Where and in what capacity?

A. As president and general manager of the Midland road. I have filled pretty much every position on a road except that of locomotive engineer.

34. During the time that you have been an official of and connected with railroads have you given the subject any study or investigation outside of the operation of your own road? If so, state whether you have familiarized yourself with railroad business.

A. I have done business with the officials of other roads, and have taken occasion to post myself as far as I was able as to the operation of other roads and compared their business with the business that I was doing on a good many occasions.

35. Are you familiar with the rental and usable value of railroad tracks?

144 A. During the last 2 or 3 years I have had occasion to post myself somewhat upon that point. I desired to use a part of the Texas & St. Louis R. R., and I looked the matter up with officials of other roads, and finally made an agreement with the president of that road, which I have in my possession, for the use of part of his track across the White river. It is in a letter from the president of that road to myself.

36. Will you file it as a part of this deposition?

A. Yes.

(Letter referred to by witness here offered in evidence and is hereto attached and marked Exhibit "A" to defendant's testimony.)

37. Are you familiar with the rental value of tracks so as to state what is usual and customary?

A. I think I am.

145 38. State what is the customary rate for the use of a track.

A. I believe it is $1.00 per train mile and upward.

39. Does that include the operation of it with the rolling stock of the railroad whose stock is being used or for the bare use of the track?

A. If it be when the rolling stock is also furnished, as well as the track, I am not so familiar with that; but I should say $1.50 to $2.00 per mile.

40. Did the use of the terminal facilities here become of any value in this contract?

A. I think they were; I so estimated them.

41. How would the usable value of them be arrived at?

A. I made an estimate as near as I could and placed the value at $5.00 per day.

42. State what the terminals consisted of.

A. Depot, machine shops, side tracks, and office in the city of Helena.

146 43. State whether or not the officials of the Midland road were employed in the business of the Iron Mountain & Helena R. R. in the city of Helena.

A. They attended to all of its business in addition to their other duties.

44. Did you supply any additional officials at Helena or increase the depot or other facilities to accom-date that business?

A. I think I built a little extra platform; that was all.

45. How many trains a day were run over that road during the time you operated it and how often were they run?

A. Run 2 trains a day, one each way, during the time I operated it; did not operate it during the busy season and was preparing to put on another train for extra business.

46. How long would that extra train have been required to do the business?

147 A. About one-third of the year at that time.

47. How often were the trains run?

A. Daily, except Sunday.

48. You stated before in your examination, and also in your answer, that this paper agreeing to fix the amount at $25,000 was signed by you but was not to be delivered. Why was it reduced to writing instead of being left verbal?

A. My recollection is that I objected to signing it in any shape. My attorney assured me that I ran no risk if I retained the paper in my possession. Mr. Bailey said that if he had it a definite amount,

stating the thing as it had been decided on, that he could go to Indianapolis and get the money and pay it off, but until he could state that it had come to an agreement that he could not go
148 to these parties in Cincinnati with any assurance of success.

49. Was the reducing the matter to writing used by Bailey as a means of preventing any misunderstanding as to what the agreement was when it came to a settlement?

A. I believe it was.

50. Was there not a proceeding against you in the United States circuit court at Little Rock, a suit in favor of the Indianapolis Rolling Mill Co., which Bailey controlled at the time this agreement was being made, and did the continuance of that cause at the term of the court then to ensue form the consideration for the agreement to continue the case here?

A. There was such a case at Little Rock, and the continuance of the case here was a part of that consideration.

A. H. JOHNSON.

149 STATE OF ARKANSAS, } ss:
County of Phillips, }

I, Norman H. Randall, an acting and duly commissioned notary public in and for the county of Phillips, in the State of Arkansas, do hereby certify and make known that the foregoing deposition of A. H. Johnson was taken by me on the 22d day of February, 1888, between the hours and at the place in the caption hereof above mentioned; that the said witness, A. H. Johnson, above named, was first duly sworn that the testimony he should give in the action named and mentioned in said caption should be the truth, the whole truth, and nothing but the truth, before his testimony in said deposition or any part thereof was given; that the testimony of said witness was reduced to writing by me, read to and subscribed by him in my presence; that the plaintiff in said action, by its attorneys, Dodge & Johnson, and the defendant in said action,
150 by his attorneys, J. J. & E. C. Hornor, were present at the examination of said witness, and that said witness is a resident of the county of ——, in the State of ——.

In testimony whereof I, Norman H. Randall, acting and duly commissioned notary public as aforesaid, do hereunto set my hand and seal of office this 12 day of March, 1888.

[SEAL.] NORMAN H. RANDALL,
Notary Public.

In the United States District Court for Eastern Division of Eastern District, Arkansas.

THE ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY, Plaintiff,
vs.
A. H. JOHNSON, Defendant.

Deposition of witnesses taken and subscribed before me, Nor-
151 man H. Randall, an acting and duly commissioned notary public in and for the county of Phillips, in the State of Arkansas, on the 29th day of Feb'y, A. D. 1888, between the hours of 8 o'clock a. m. and 6 o'clock p. m. of said day, at the office of Jno. J. & E. C. Hornor, in the city of Helena, in the county of Phillips, in the State of Arkansas, in pursuance of the notice hereto annexed and to be read as evidence in a certain cause now pending in the United States district court for the eastern division of eastern district, Arkansas, wherein The St. Louis, Iron Mountain & Southern Railway Company is plaintiff and A. H. Johnson defendant, on the part of defendant.

A. H. JOHNSON, a witness known to me to be of lawful age, being to me at the time and place aforesaid produced and being by me first duly sworn to testify the truth, the whole truth, and nothing but the truth in regard to the matters in controversy in the action aforesaid, did then and there, on his oath aforesaid, depose as follows, to wit:

Direct examination by Maj. JNO. J. HORNOR:

1. Have you been sworn in this case?

A. I have.

152 2. Are you the same person who testified in this case on the 22d day of February?

A. I am.

3. Were you present in St. Louis, on the 24th day of February, when Mr. E. G. Merriam testified in this case; and, if so, did you hear him testify?

A. I was present and heard him testify.

Q. In his testimony he speaks of an interview with you in February, 1883, in which he says you exhibited to him a paper-writing purporting to be a settlement with the Iron Mountain & Helena R. R. for the construction of the road by you to Marianna. Please state whether you did exhibit that paper to him; and, if so, relate all you know about it.

A. I exhibited that paper to Mr. Merriam, in 1883, at that interview referred to by him. I went to St. Louis at the request
153 of Capt. Hays or Mr. Merriam, both officers of the Iron Mountain road, I don't remember which, to see if we couldn't settle. Mr. Merriam said that they could pay me whatever Mr. William Bailey would acknowledge was due me; but that it was not more than $12,000 or $15,000; that Mr. Bailey had said that he could settle with me for $12,000 and not to exceed $15,000 at the

outside. I had this paper in my possession and showed it to Mr. Merriam and told him that Mr. Bailey had agreed to that amount at one time, but had failed to make it good, and that it was impossible for me to come to any settlement with Mr. Bailey—to come to any agreement or fix on any amount he would allow—and that I would not try to, as I was satisfied that he would not agree to any amount that would satisfy me. I exhibited this paper, not because it had any binding force on me at that time or on any one.
153½ I didn't suppose it had. Its conditions had been violated and I had no belief that the paper had any binding force. I merely exhibited it to Mr. Merriam to convince him that I could come to no understanding with Bailey. I put it in my pocket and it remained there until my attorney called for it in my forcible entry and detainer case afterward against the Iron Mountain road.

4. Did you at that time or afterwards have any interview with Capt. Hays, and who was he?

A. I did. At that time and on several occasions I had conversations with Capt. Hays. He was general manager of the Missouri Pacific system and more particularly of the St. Louis, Iron Mountain and Southern. In our several conversations Capt. Hays expressed a desire to settle with me and offered to pay whatever
154 Mr. Bailey would concede. He said he would pay whatever sum Mr. Bailey and I could agree upon; but that he must have Bailey's endorsement, for if they paid me more than that they would have to pay it from their own money. I told Capt. Hayes it was impossible for me to come to any agreement with Mr. Bailey, and that there could be no settlement made in that way. Capt. Hayes told me at that time that Mr. Bailey had represented to him that he could settle my claim for $12,000 or $14,000.

Cross-examination of A. H. JOHNSON by Mr. DODGE:

1. You state that at the time you showed this written stipulation to Mr. Merriam that you had certain views as to whether that paper was then of any validity or not. Did you express those views
155 to Mr. Merriam as you have expressed them in your deposition of to-day?

A. I don't believe I did. I have no recollection upon that matter.

2. Have you any recollection of anything having been said as to whether that paper was of any binding force upon Mr. Bailey or yourself?

A. I don't think I discussed it. My opinion as to the validity of the paper was obtained from Maj. Hornor.

3. At what time did you ever obtain any opinion from Maj. Hornor as to the validity of this paper?

A. My recollection is that I obtained my information from Maj. Hornor at the time this paper was written. When I objected to signing such a paper with Mr. Bailey and before I signed it Maj. Hornor told me that it would not bind me in any way beyond
156 the time specified. I think we talked it over whether the paper was of any binding force or not, and that I acknowl-

edged that it was not, and that I didn't care to have that govern me in the settlement at all; and in proof of that we offered to settle afterward or at that time for $21,000.

4. I understand you to say now that you do recollect having discussed the validity of this paper with Merriam; is that the case?

A. The more I think it over the more it comes to my mind that I did. I did not remember showing that paper to Mr. Merriam till I heard his testimony, and that brought it to my mind.

5. Do you recollect that you in any manner represented that paper at that time as being of no validity?

A. I do not.

6. You speak of interviews you had with Capt. Hayes at
157 various times looking to a settlement of this matter. Do you remember the reasons more specifically that Capt. Hayes gave for not being able to settle—why it was necessary to get Bailey's consent?

A. I understood that the agreement between them and Bailey was rather secret at the time. I either learned then or afterwards that they had some sort of guarantee from Bailey as to these debts, and that it was necessary for them to have his endorsement or consent before they paid anything. I think Mr. Merriam told me that they had paid over all the securities, and whatever they paid to me they would have to pay extra. I think Capt. Hayes told me that he thought he would have trouble if he paid me more than they had agreed.

A. H. JOHNSON.

158 JOHN J. HORNOR, a witness, *a witness*, known to me to be of lawful age, being to me at the time and place aforesaid produced and being by me first duly sworn to testify the truth, the whole truth, and nothing but the truth in regard to the matters in controversy in the action aforesaid, did then and there, on his oath aforesaid, depose as follows:

My name is Jno. J. Hornor; 54 yea-s of age; reside in Helena, Arkansas; my occupation, a lawyer; have been attorney and counsellor for Mr. A. H. Johnson in regard to his railroad matters and other matters at Helena since the fall of 1877—possibly 1878—but soon after the purchase of the Midland road. I am the same person referred to by Mr. E. G. Merriam in his deposition given in this cause on the 24th of February, in St. Louis, and was present
159 when the deposition was taken. I wrote the paper which purports to be a settlement between A. H. Johnson and the Iron Mountain & Helena railroad in my office, in Helena, on the 6th day of October, 1881, and I remember the circumstances attending the writing of it. After the paper was written—which was written after a discussion between Mr. Bailey and Mr. Johnson about the settlement of the amount which Mr. Johnson was willing to accept from Mr. Bailey in payment for the work of building a part of the Iron Mountain & Helena railroad—they had agreed as a compromise that Johnson would accept from him $25,000 for the

work, Bailey representing that he would be able to raise the money within 30 days and pay it, I sat down and wrote the paper. They were discussing also the cause then pending in the United
160 States court at Helena. While I was writing the paper Johnson said, "You must also pay me $1,500, which was contributed by me, together with other citizens of Helena, to pay on the freight upon iron, an amount intended to be $500." Bailey said, "I do not know whether you paid the $1,500." Johnson said, "I do not know how much I paid, but you must pay me the $1,500." Bailey agreed to do this. After I had written the paper Mr. Johnson then said he would not sign any paper, and that his word was good enough; that he had already signed enough papers. Bailey wanted the paper signed as an evidence that if he complied within the time the amount would be fixed. Either I mentioned it to Johnson or he said that he would sign it if he could keep it and not let Bailey handle the paper. The paper was signed then or afterwards. Then Bailey wanted to extend the time. The $25,000
161 was to be in cash. Bailey said, "I may not be able to do it in the 30 days, but I will within the month of November either pay the $25,000 in cash or furnish securities that Major Hornor will agree to accept." Finally Johnson said to him, "If you will furnish securities that Major Hornor will agree to accept within the month of November I will agree to take it." Mr. Johnson had the paper. I didn't change it at all, because it was not delivered and wasn't going to be delivered; never thought anything about it. The compromise between Johnson and Bailey was first contingent upon Bailey paying $25,000 cash within 30 days. Then Bailey agreed to pay $1,500 more. Then he changed it to paying it within the month of November or furnishing securities that I would accept. I never thought anything more about it because I didn't
162 believe when he left there that he was going to do anything.

Afterwards, when this case of Johnson against the Iron Mountain & Helena was tried for the possession of the road, Bailey, I knew, was going to testify that there was only about $15,000 due Johnson, and he did so testify, and I asked Mr. Johnson for this paper and asked Bailey if he did not agree at that time that there was $25,000 due him. He said "Yes," but that he did it under compulsion, and that it was not binding on him. My only object in introducing it there was to discredit Bailey. The paper I never took out of the court-house, but just left it there, and afterwards, in preparing the case for the Supreme Court I saw the paper not filed, and I left it there because it was of no value. It was not even filed, because I remember that it was only handed Bailey when
163 I asked that question, and he said, "Yes." After this trial in March, 1883, at the invitation of Governor Brown, who was solicitor of the St. Louis, Iron Mountain & Southern, I went to St. Louis to see if the matter could't be compromised. I was very anxious to settle it and urged Johnson to do so. I urged him also when Bailey proposed the compromise in 1881. I went to St. Louis some time in the early part of April, 1883, I think the first week in April.

I went with A. H. Johnson, whom I met in St. Louis, to Gov. Brown's office for the purpose of discussing this compromise. Prior to that time I had received a letter from Johnson stating that he had been there and that they wanted an interview, and they had agreed to write to him to come in. I also got a letter from Bailey. When we went into Brown's office, after a short conversation upon
164 other matters the subject of the compromise came up. Gov. Brown said they could not pay more than $15,000; that that was all that was due Johnson, and that Bailey had so represented to him. Then we talked for a while, but not very much on this subject, because $15,000 was out of the question, and I didn't intend to entertain any such proposition. We left and went to the hotel. While at the hotel I urged Mr. Johnson to make a proposition of settlement, but he was very reluctant to do so. He said he couldn't make any proposition that would be accepted. I was always anxious to have them settle, for it was to the interest of the town and everybody. I named the sum of $21,000, and urged him to make that proposition to Gov. Brown, and finally he agreed that I might go there and make it myself. I went back to make this proposition of $21,000. After I went in Mr. Merriam came in,
165 and I met him that morning for the first time. I made the proposition to Gov. Brown that Johnson would settle the matter for $21,000. Mr. Merriam became very much excited—in fact, his excitement bordered on impoliteness. He said that there was no such sum due, and that there was an effort on the part of the people here to blackmail the road. Turning to Gov. Brown I said that I came there to discuss the matter with him. He spoke to Mr. Merriam; said he was excited, and apologized for him. Merriam then stopped, and the conversation was between Brown and myself. Gov. Brown said they couldn't think of paying $21,000, that all that had been represented as due Johnson was about the sum of $15,000, and that Bailey said that was all there was due. I said that Bailey at one time agreed to pay $25,000 as a compromise in this
166 matter, but never carried it out. He said they could not pay anything more than Bailey would consent to; that it would have to be paid out of their own pockets if they did. Afterwards I left there and went back to the hotel, and very soon after getting to the hotel and meeting Johnson Mr. Bailey came in. He commenced in an upbraiding tone a conversation about our business there, which I paid no attention to. He insisted that they were interfering with his business, and said that he wanted to settle it and would settle it, and that he would notify them that he would settle it. Some time after that he enclosed in a letter to me a proposition for settlement to be submitted to Mr. Johnson. The letter was dated April 14th. I have the letter now, but not the proposition, which was $16,000. I don't know what I did with it, but presume
167 I sent it to Mr. Johnson. After *after* that I received a letter from Gov. Brown, wanting to know what had become of the proposition to settle, as he wanted to know in time to take an appeal in the case. I either then wrote to Johnson or had written on receipt of this proposition from Bailey, but I received an answer which

I cannot find, though I am satisfied that the letter filed by Mr. Merriam contains what Mr. Johnson —, because it is in quotation marks; it is over my signature. I wrote it myself some time in May, 1883; it contains Johnson's reply, in which he says he will take $25,000 at 6% interest from the 6th day of October, 1881. That was the substance of Johnson's letter to me, and was what I advised him. After we left St. Louis I told him never to take less than that, and in that letter I said, as a reason for the advance from $21,000
168 to $25,000, that that was the sum at which Bailey and Johnson had settled. I gave that as the reason for advancing the amount that they had settled at that sum. Afterwards, in 1887, Mr. Dodge and Mr. Merriam came to Helena and had an interview with Johnson and myself in regard to settling this matter in my office. Mr. Merriam did most of the talking as to the amount of settling and wanted Mr. Johnson to make a proposition as to what was the lowest amount he would take, and this matter of the $21,000 was referred to. Mr. Merriam wanted him to settle it at that figure, and again—I again mentioned the fact that Bailey and Johnson had once agreed upon $25,000, and Mr. Merriam said, "Yes. Where is that paper?" I told him that I was satisfied that it was in
169 the clerk's office among the other papers. The next day, I think, Mr. Merriam or Dodge showed me the paper and said they had found it there. That is about all that I know of this matter, as I remember it now.

Cross-examination of JOHN J. HORNOR by Mr. G. E. DODGE:

1. When you produced that paper in court on the trial of the forcible entry and detainer suit, was Mr. Bailey on the witness stand?

A. He was.

2. Did you not first show the paper to me before handing it to Mr. Bailey to apprise me of its contents?

A. I don't remember, but think it is likely, because I would naturally do so.

3. Did this not occur at a period in Bailey's testimony where he was endeavoring to show that there was a smaller amount
170 due Johnson?

A. He was testifying on that point at that time.

Witness here states in his own behalf:

In the trial of this case spoken of in the cross-examination the question as to the character and value of the work I did not consider as an issue because the suit was for possession.

JNO. J. HORNOR.

STATE OF ARKANSAS, }
County of Phillips, } ss:

I, Norman H. Randall, an acting and duly commissioned notary public in and for the county of Phillips, in the State of Arkansas, do hereby certify and make known that the foregoing deposition of

Jno. J. Hornor was taken by me on the 29th day of Febru-
171 ary, A. D. 1888, between the hours and at the place in the caption hereof above mentioned; that the said witness, Jno. J. Hornor, above named, was first duly sworn that the testimony he should give in the action named and mentioned in said caption should be the truth, the whole truth, and nothing but the truth before his testimony in said deposition or any part thereof was given; that — was reduced to writing by me, read to and subscribed by him in my presence; that the St. Louis, Iron Mountain & Southern railway, by its attorney, Geo. E. Dodge, and the defendant in said action, by his attorneys, J. J. & E. C. Hornor, was present at the examination of said witness, and that said witness is a resident of the county of Phillips, in the State of Arkansas.

In testimony whereof I, Norman H. Randall, acting and
172 duly — notary public as aforesaid, do hereunto set my hand and seal — office this 12th day of March, A. D. 1888.

[SEAL.] NORMAN H. RANDALL,
Notary Public.

Charges, $13.52, paid by defendant.

Exhibit A to Testimony of A. H. Johnson.

THE ST. LOUIS, ARKANSAS AND TEXAS RAILWAY,
EXECUTIVE DEPARTMENT,
ST. LOUIS, MO., *June* 18, 1887.

A. H. Johnson, Esq., pres. Ark. Midland R'y, 68 Williams St., New York, care Henry Talmadge.

DEAR SIR: Referring to the matter of giving you the privilege of hauling your construction material from Clarendon to where you expect to leave our line on the west side of White River, the total distance is in the neighborhood of eight miles; but, taking
173 the character of the work into consideration, it is equivalent to 21 miles; will make you either of the following rates:

First. The rate of one dollar per train mile, rating the distance as equivalent to 21 miles, or, in other words, $21.00 for each trip of engine and cars, rate to apply to train going east and train going west—$42.00 for the round trip; or we will make you the rate of $1.50 per car, loaded and empty, each way; $2.00 for an engine each way, with the understanding that this is only a temporary arrangement for construction material entirely, and the further understanding that you move your trains under the direction of our train dispatcher and between the hours 7 p. m. and 6 a. m. I make these hours for the reason that during this summer we well renew
174 a large portion of the trestle-work at White River and do not want to move pile-drivers out of the way of your construction material. All cars to be subject to inspection by an agent of this company, and any car considered by him to be overloaded to

be set out of train and load reduced before passing over our track, as in no case shall any car be loaded beyond its car-load capacity.

Before entering upon this agreement it will be necessary to make a contract releasing this company from any damage to your engines, cars, or employees by reason of derailment or other accident.

Yours truly, S. W. FORDYCE, *President.*

"Exhibit A."

Endorsed: Filed March 13, 1888. Samuel I. Clark, clerk.

175 On the 14th day of March, 1888, the following decree was entered, viz:

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY, Complainant,
vs.
ALFRED H. JOHNSON, Defendant.

Now, on this day, come the complainant, St. Louis, Iron Mountain & Southern Railway Company, by Dodge & Johnson, its solicitors, and also the defendant, A. H. Johnson, by his solicitors, Jno. J. & E. C. Hornor; and this cause coming on to be heard, whereupon, upon consideration, it is ordered, adjudged, and decreed that upon the said plaintiff paying into the registry of the court the costs of this suit and the sum of one thousand dollars for the amount expended by the defendant in necessary preparations to take possession of the eighteen (18) miles of railroad mentioned in the bill and operate the same as required by law that the defendant shall
176 be thereupon perpetually enjoined from executing or attempting to execute the judgment at law in his favor for the possession of said eighteen (18) miles of railroad mentioned in the bill; and should the said plaintiff fail to pay said sums into the registry of the court for the use of the defendant within ninety days from this date, then and in that case the temporary injunction heretofore issued in this cause shall be dissolved, and said defendant may sue out proper process and execute said judgment at law in his favor for the possession of said eighteen (18) miles of railroad.

And the said plaintiff and the said defendant severally pray an appeal from this decree to the Supreme Court of the United States; which prayers are severally granted.

177 UNITED STATES OF AMERICA,
Eastern Division of the Eastern District of Arkansas.

I, Samuel I. Clark, clerk of the district court of the United States in and for the eastern division of the eastern district of Arkansas, do hereby certify that the above and foregoing 124 pages of manuscript contain a true and correct transcript of the proceedings of the court had in the above-entitled cause as the same remain on file and of record in my office.

Seal of the United States Court, Eastern District Arkansas, Helena.

In testimony whereof I have hereunto set my hand and official seal, at office, in Helena, this the 15th day of December, 1888.

SAMUEL I. CLARK, *Clerk.*

Cost of transcript, $32.25.

Endorsed on cover: E. Arkansas D. C. U. S. No. 380. A. H. Johnson, appellant, *vs.* The St. Louis, Iron Mountain & Southern Railway Company. Filed July 13, 1888. And No. 391: The St. Louis, Iron Mountain and Southern Railway Company, appellant, *vs.* A. H. Johnson. Filed August 8, 1888.

No. 380.

Supreme Court of the United States.

A. H. JOHNSON, *Appellant*,

v.

ST. LOUIS, IRON MOUNTAIN &
SOUTHERN RAILWAY COMPANY, *Appellee*.

STATEMENT OF FACTS AND BRIEF
FOR APPELLANT.

ARKANSAS DEMOCRAT CO., LITTLE ROCK.

No. 380.

Supreme Court of the United States.

A. H. JOHNSON, *Appellant*,

v.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY, *Appellee*.

STATEMENT OF FACTS.

On the 23d day of April, 1879, a contract was entered into between the Iron Mountain and Helena Railroad Co., a corporation then existing under the laws of the State of Arkansas, and the appellant, A. H. Johnson, for the construction of a portion of the railroad of the said Iron Mountain and Helena Railroad Co., being that portion of said railroad between its junction with the Arkansas Midland Railroad and the town of Marianna, by which it was agreed that in consideration of said A. H. Johnson completing the grading, tieing, culverting, clearing and grubbing, furnishing all cross ties and square timber needed, laying down the iron rails and placing said road between said points in good running order, he the said appellant should receive the sum of

$29,000.00, to be paid in the manner set forth in said agreement; and it was also further agreed that until said sum of $29,000.00 was fully paid, said appellant should have possession of said railroad and should have the right *to run, use and control the same.* (Transcript, p. 5.)

For a more clear and complete understanding of this contract it will be necessary to state that Johnson, the appellant, was then the owner and was operating the said Arkansas Midland Railroad, which was a narrow-guage railroad extending from Helena westward to Clarendon, a distance of 50 miles. The Iron Mountain and Helena Railroad was a railroad projected to run from Helena northwestwardly toward St. Louis. Some grading had been done upon the line of the latter road, some cross ties and square timbers had been gotten out and distributed, and its projectors had purchased a quantity of iron rails, spikes and fastenings, but were unable to complete the road-bed or lay down the rails. These two lines of railroad ran parallel for a distance of eight miles and then diverged, the one going westwardly and the other northwardly. It was conceived that it would be best to put the Iron Mountain and Helena Railroad in operation by commencing the laying of rails and completing its road-bed from the point of divergence and operate it over the Midland road for the eight miles above mentioned. The Iron Mountain and Helena Railroad had no locomotives, or other rolling stock. Under this contract Johnson went on and completed the road between said junction and the town of Marianna, and when completed, he operated the same

with rolling stock furnished by him, until on or about September, 1880, when said Iron Mountain and Helena Railroad, through its President, one William Bailey, forcibly dispossessed said Johnson of said railroad. Afterward said Johnson under the statutes of the State of Arkansas brought his action of forcible entry and detainer on the law side of the District Court of the United States for the Eastern Division of the Eastern District of Arkansas, at Helena, to recover possession of said railroad from which he had been forcibly driven; afterwards, and while said suit was pending, the appellee, the St. Louis, Iron Mountain and Southern Railway Co., became the purchaser of said railroad and took possession of the same on the 15th day of December, 1882; afterwards, at the March term, 1883, of said district court, the appellee was made a party defendant to said action of forcible entry and detainer on its own motion, and in said cause on trial thereof said Johnson, the appellant, obtained judgment for possession of said railroad. Afterwards said appellee sued out a writ of error to this Honorable Court, and such proceedings were had that said judgment of the District Court of the United States was affirmed.

I. M. and H. R. R. Co. v. Johnson, 119 U. S., 608.

After the affirmance a mandate of this court was filed in the said district court and a writ of possession awarded appellant for said portion of said Iron Mountain and Helena Railroad.

Before said writ of possession was sued out said appellee

filed in the said district court its bill, praying an injunction restraining said appellant from taking possession of said railroad either by himself, his servants or agents, because it said that said Johnson was only entitled to the possession of said railroad as security for his debt; that he was then entitled only to the sum of $33,825.00, which sum it was ready and willing to pay and offered to pay into court, and that if said Johnson was permitted to take possession of said portion of said railroad under said writ, or otherwise, it would seriously inconvenience said appellee in the operation of its line of railroad, known as the Helena Branch of the St. Louis, Iron Mountain and Southern Railway. (Tr., pp. 1-3.) On the presentation of this bill to the Hon. Henry C. Caldwell, Judge of the United States District Court for the Eastern District of Arkansas, it was ordered that upon the payment of all costs in the case of A. H. Johnson v. Iron Mountain and Helena Railroad Co., and the depositing, in the depository of said court, of said sum of $33,825.00, the injunction as prayed for should be issued by the clerk. (Tr., p. 4.)

Such deposit was made and an injunction issued. (Tr., pp. 7-10.)

Subsequently the appellant filed his answer in which he admitted the making of the contract with the Iron Mountain and Helena Railroad Co., filed as exhibit A to complainant's bill; that he was in possession of the road, operating the same under said contract in September, 1880, when he

was forcibly dispossessed; admits the purchase of the Iron Mountain and Helena Railroad by the appellee, that the appellee was made a party defendant to the suit brought by him against the Iron Mountain and Helena Railroad Co. to obtain possession of the part of the railroad constructed by him; the judgment in his favor in said suit and the affirmance of the same by this Honorable Court; denies that under the contract he was to hold possession of the said road merely as security for his debt; denies that there was ever any agreement between him and the Iron Mountain and Helena Railroad or any other person as to the sum due, and in the answer, said appellant fully set out all the facts and circumstances attending the construction, operation of the road and suit for forcible entry and detainer, and his action and purpose after the awarding of the writ of possession and prior to the issuance of the writ of injunction. (Tr., pp. 11-19.)

At the first term of the court after filing of the bill, appellant filed his motion to dissolve the injunction. At the March term, 1888, the court decreed that upon the appellee paying into court the cost of this suit and the sum of $1,000.00, amount expended by appellant in necessary preparation to take possession of said eighteen miles of road; that appellant be perpetually enjoined from taking possession of said eighteen miles of road. (Tr., p. 55.)

The contention of appellant is that the court had no jurisdiction to grant the injunction prayed for by appellee.

1. Because the appellant in an action of forcible entry and detainer instituted by him against the Iron Mountain and Helena Railroad and to which appellee on its own motion had been made a party defendant in the District Court of the United States for the Eastern District of Arkansas, at Helena, and had taken upon itself the defense of said suit, had been adjudged entitled to the possession of said railroad, and a writ of restitution ordered to be issued to place him in possession thereof, and the bill contains no allegation that anything has arisen since the institution of said suit or rendition of said judgment which rendered it inequitable that said judgment should not be enforced.

2. Because it appears from the allegations in the bill that the relations existing between the parties were entirely contractual: that appellant was seeking nothing not provided by the contract to be enjoyed by him; and the bill contains no allegation that such contract, or the rights sought to be enjoyed by appellant, were obtained by fraud, accident, mistake or surprise.

3. Because by the pleadings it appears that the appellee is a trespasser in possession, after full defense made by it to the action at law for such trespass, and without restitution or offer of restitution, seeks through the interposition of a court of equity, to retain the fruits of its trespass and nullify the judgment at law.

4. Because the bill does not seek to settle the rights of the parties under the contract of April 23, 1879, nor does

the decree of the court settle such rights. The order of the judge granting restraining order and the decree nullify the contract by substituting a sum of money as appellant's security instead of possession of the road as provided in such contract.

ARGUMENT.

By the term of the contract, appellant was placed in possession of that portion of the Iron Mountain & Helena Railroad which he constructed, with the right to *use, operate and control it* until he was paid the full sum, which, by the terms of the contract, it was agreed should be paid him Of this, there can be no question. Such was settled by the judgment of this court in the action of forcible entry and detainer. See *Johnson v. Iron Mountain & Helena R. R., 119 U. S., 608.* And is manifest from the terms of the contract.

Before any payment was made, or even any attempt to settle or adjust his account, he was forcibly and unlawfully driven from possession of said property. He was thus not only deprived of the benefit which the possession of the property gave him as security for his debt, but was also prevented from reaping the benefits which the right to operate and control the road gave him during the time he was kept out of his said debt. The appellee, having gone into possession under a purchase from the Iron Mountain & Helena Railroad Co., *pendente lite*, and having made itself a party to

the suit in the district court, undertook the defense, and prosecuted the appeal, and was as much a trespasser as the Iron Mountain & Helena Railroad Co., which, by its officers, with force and violence, unlawfully deprived appellant of his possession. And the appellee is in no sense less a trespasser because its vendor was the owner of the railroad subject to the right of appellant to hold possession, than any stranger who had with force and violence unlawfully entered upon such possession.

By the terms of the contract, under which appellant went into possession, he was not only entitled to retain such possession until he was paid, but he was also, pending any controversy over the amount due him, authorized to retain the possession and operate and control the railroad until, not only the amount was determined, but payment was actually made. When the Iron Mountain & Helena Railroad forcibly dispossessed him, the purpose of its officers was to reverse the order created by this contract. The appellant, however, treated the trespass and the trespasser as it deserved, brought suit for restoration to the position which he occupied when the trespass was committed, and having obtained the judgment of the court that the act was a trespass as against him, he was certainly entitled by every principle of justice to be placed in the position originally occupied by him, before the trespassers could be heard in any court to question or contest the amount due him under the contract.

Appellee by its bill seeks to restrain appellant from obtaining the fruits adjudged him in the action at law, and to

nullify and set aside this judgment. As the grounds for invoking this interposition of a court of equity, appellee alleges that there is only due under the contract hereinbefore set out, the sum of $25,000.00, which sum is $4,000.00 less than is the contract price, as shown on the face of the contract; that appellant claims a larger sum, and consequently they are unable to agree, and that said appellant proposes and is preparing to take possession of said eighteen miles of road under the judgment in the action at law, and that if he does take possession it will cut off appellee from all use, benefit and advantage of its line of railway the entire distance from Marianna to Helena; that such a proceeding will result in irreparable damage to appellee, causing it such loss and injury as it cannot be compensated for in an action at law; that it will disable it from discharging its duty as a common carrier of freight and passengers over the portion of said railway above mentioned, and from the performance of its said duties as a carrier of the mail, and will otherwise cause it to suffer irreparable damage and injury for which it will have no adequate remedy at law. These are the allegations under which the court of equity is asked to restrain the execution of a judgment at law in an action of trespass.

Equity will interpose to restrain the execution of a judgment upon the suggestion of fraud, accident, mistake or surprise in procuring it. In the case at bar there is no suggestion of fraud, accident, mistake or surprise. On the contrary, the sole issue in the action at law was the right of appellant under his contract to keep possession of the road, and

all the defense which legal acumen could bring forward to defeat this right were invoked.

The bill suggests nothing which had arisen since the judgment in the action at law by which the appellant had forfeited, either at law or in equity, the right of possession given him by the contract and confirmed by the judgment.

The only ground alleged and relied upon is the fact that irreparable damage and injury would result to appellee because it was a common carrier operating a railroad between Marianna and Helena, carrying the United States mail, and if it was deprived of the possession it could not discharge these duties. The line of railroad from Marianna to Helena, and which appellee says it would be irreparably damaged by being prevented from operating, was *created by appellant, he was the first common carrier over it*, discharging a like duty to the public, and likewise carrying the mail under a contract with the government, when the appellee, through its predecessor and by its affirmance, drove him out of possession, and by such *trespass* and *force* took upon itself the duty of common carrier.

It became a common carrier not by building a line of railroad or by purchasing a line of railroad, nor in any lawful manner, but became so by forcibly taking possession of a line of railroad rightfully in possession of the appellant, over which he was performing all the duties of a common carrier. The appellee created a condition of affairs by its own wrongful act, and now sets up that condition as a reason for the

interposition of a court of equity to protect it in the enjoyment of the fruits of such wrongful act.

It also attempts to invoke the aid of public policy to restrain the enforcement of this judgment because the public had a right to the operation of that road, but the bill alleges that the appellant was proposing to take possession of it, the judgment at law and the contract show that he had operated it, and the facts are that he was proposing to resume the operation of it as a public carrier between Marianna and Helena. Therefore the public convenience would not be endangered. The law could make no distinction between the carriers.

The condition of affairs alleged in the bill to exist then, equally existed pending the action of forcible entry and detainer in the district court before judgment, and after judgment while pending on appeal in this court. The appellee was a common carrier from Marianna to Helena, it was a trespasser in possession of the road, knew of the existence of the contract, not only because the suit was pending, but the contract was a matter of record in the counties through which the railroad passed. If desiring to settle the just demands of appellant it had filed a bill on the chancery side of said district court and asked that the proceeding at law be stayed until the amount due appellant for the construction of said railroad could be settled by a decree of that court, appellee would have appeared in a far better light than to have waited until after the right of possession had been judicially determined against it. Certainly no equitable considerations

could now be urged when the action of forcible entry and detainer had been determined against it.

Even if the application had been made to restrain the prosecution of the action of forcible entry and detainer, no injunction would have been granted unless it appeared that certain, manifest irreparable injury would have followed the withholding the relief.

Crawford v. Payne, 19 Iowa, 172.

Lamb v. Drew, 20 Iowa, 15.

"The rule rests upon the well established principle that he who invokes the aid of equity must come into court with clean hands, and in point of law one who is liable for an action of forcible entry and detainer has a taint of wrong about him, and is not, as a matter of right, entitled to the interference of a court of chancery."

Hamilton v. Hendricks, 1 Bibb., 70.

McGuire v. Stewart, 1 Mon., 189.

High on Injunctions, section 65.

How much stronger is this rule when applied to the case at bar where the appellee declined to ask the aid of a court of equity to enable it to make a settlement of its rights with the appellant during the period of seven years, while the action of forcible entry and detainer is pending, and yet, when convicted of the trespass, and the appellant is about to resume his just rights as possessor of the property and take

upon himself the duties of common carrier over that portion of the road, rushes to a court of equity and asks it at that late day to interpose and protect it in the enjoyment of the fruits of its trespass until through the delays incident to a bill in equity it can complete a settlement with the appellant.

Even under the rule laid down above it is not sufficient that the bill charge that irreparable injury would ensue, but it is necessary that it should appear to the court from the allegations of the bill that such irreparable injury would certainly and manifestly follow the withholding of the relief asked. Not only this, but the irreparable injury must appear to be such as has not been brought about by the wrongful act of the party complaining.

It is an elementary principle of law that a man who has put himself in the wrong, or who has by his own conduct brought about the state of things of which he complains, cannot invoke the aid of a court of equity.

Kerr on Injunctions, p. 18.

In the case at bar the allegations of the bill show that no irreparable injury could be sustained and particularly that the public would suffer no injury whatever, because it says, "that the said Johnson with a view to compelling this complainant to pay a sum largely in excess of what is justly due, is preparing to take actual possession of said eighteen miles of track and to that end is building a connection between the Arkansas Midland Railroad, which said Johnson partly owns and controls, and the Helena branch of the St. Louis, Iron

Mountain & Southern Railway, at a point eight miles north of Helena." From this it appears that before taking possession Johnson was building a connection so as to be able to operate the road from Marianna to Helena and no injury could result to the public, but as was contemplated by the contract, Johnson was to become the carrier between Marianna and Helena until fully paid. The only injury alleged was the fact that they would, as provided in that contract, cease to be the public carrier, and the only reason they say why they would cease to be the public carrier or why the court should interpose, is that Johnson would not agree that their interpretation of the contract was correct and receive payment in accordance with such interpretation.

Counsel submit that the court erred in the application of law to the case at bar. If the judgment in the action at law had settled the amount due Johnson under the contract for constructing the railroad and there was nothing else to be judicially determined as to his rights under the contract, and he had refused to accept payment in accordance with the terms of the judgment, then a court of equity might reasonably have interposed on a tender of the amount adjudged to be due, and restrained appellant from annoying or harassing appellee by any levy under said judgment. Or if a specific sum had been adjudged to him and the judgment had been obtained by fraud, accident, mistake or surprise, then upon an allegation of such a fact the court would have stayed the execution of that judgment until the amount due had been judiciously settled; but even in a money judgment, a court

of equity would not have gone into the consideration of the sum due under the contract without such allegation. And counsel submit that when possession of the road was adjudged to appellant by a court of competent jurisdiction, no court of equity could interfere with the execution of that judgment without an allegation that the judgment had been obtained in an unconscionable manner.

High on Injunctions, sec. 85.

Lamb v. Drew, 20 Iowa, 15.

If appellee had desired at any time to have settled the controversy as to what was due appellant under this contract the courts were open from January, 1880, when the road was completed to Helena and put into operation, down to and until the March term, 1887, when the mandate of the Supreme Court was filed.

And it was even open up to the time when this bill was filed. But from the filing of the mandate the right of appellant to retake possession of the road was complete and perfect, and no court, and particularly a court of conscience, would, upon a mere allegation that the parties had disagreed as to the amount due under the contract, prevent him from enjoying the fruits of his contract after so tedious a litigation. The fact is, that when the court issued that injunction it placed the parties exactly in the position they were when the appellant brought his action of forcible entry and detainer. It not only practically, but actually, annulled the judgment of this court. When Johnson brought his action he affirmed

that the possession had been tortiously taken from him, the court adjudged that this position was correct and awarded restitution, and when the injunction was granted the same tortious possession existed and was by the court of equity protected.

He who comes into a court of equity for relief must show that his own acts and dealings in the matter have been fair and consistent with equity.

Kerr on Injunctions, p. 18.

This principle of law is peculiarly applicable to the case at bar because appellee had utterly failed and refused to obtain any adjustment of the amount due during all the period when the right of possession was being litigated by it, but as soon as it is adjudged a trespasser demands a settlement upon its own terms, and failing to obtain it cries out that it, as well as the public, will suffer irreparable injury if a court of equity does not maintain it in its wrong doing, and actually not only tendering a less amount than the terms of the contract agreed should be paid, but a less amount than was actually due on its own interpretation of the contract.

A court of conscience will not place a wrong-doer in a better position than he has placed himself, it will leave him exactly where it finds him.

Creath's Admr. v. Sims, 5 How., 205.

Sample v. Barnes, 14 How., 70.

A court of equity will not protect a party in the enjoy-

ment of that which he has obtained by a violation of law and thereby enable him to benefit by his own wrong.

Collett v. Jones & Hall, 7 B. Mon., 580.

Howard v. Current, 9 B. Mon., 492.

The relation between the parties was contractual and the bill seeks through a court of equity to relieve appellee from the effects of the contract merely because the enforcement will now prove a hardship.

As a fundamental principle the remedy upon contracts is at law. The purpose of the bill, as appears from its terms, is not to rescind the contract, nor to reform it, nor to construe it, but merely asks the court to deny one of the contracting parties a portion of the rights guaranteed by such contract to him. It is admitted in the bill that the contract provided for this right; that it was fairly entered into; that nothing has occurred since on the part of the appellant which waived it, but simply says that by reason of the conduct and acts of the appellee entered into and consummated since this contract was drawn, it would be a great hardship upon appellee to now permit appellant to enjoy the benefit of his contract.

The jurisdiction of the court of equity over contract rights depends upon fraud, accident, mistake or surprise. No principle of law is better settled than that, where parties capable of contracting, knowingly enter into a contract not

prohibited by law, nor against public policy, they must abide by and perform such contract according to its terms. If parties stand upon an equal footing and no fraud is committed by either, each must abide by the contract. There is no pretense that any fraud was committed; that the parties contracting did not stand upon an equal footing when the contract was made, yet a court of equity is asked to restrain one of the contracting parties from enjoying the benefits provided by the contract to be enjoyed by him and which were placed there by his own prudence and foresight for his benefit, simply because in the changes which time has brought about, such contract, if enforced according to its terms, would result in a hardship to appellee.

Mere hardship or inconvenience will not authorize a court of equity to set aside the terms of a written contract.

Elting v. Bank of U. S., 11 Wheat., 59.

Stettheimer v. Killip, 75 N. Y. 282.

Nor will a court of equity relieve a party from an improvident or foolish contract, if entered into without fraud or misrepresentations on the part of the other contracting party.

Moffatt v. Winslow, 7 Paige Ch., 124.

The appellee is a trespasser in possession, after full defense made by it to the action at law for such trespass.

The pleadings show that appellee was, in the action at

law above cited, adjudged a trespasser. It is a fact that full defense was made to that action, and whether or not the record shows it, the law will presume that full defense was made. It is therefore presumable that the very defense now set up before the court of equity was made in the action at law. It was quite as available there as in a court of equity. The only thing alleged in the bill which a court of law could not have considered is that irreparable injury would result to the appellee from an enforcement of the judgment at law. We have already shown in a previous portion of the argument that it is not sufficient to give a court of equity jurisdiction barely to make the allegation of irreparable injury. It must appear from the bill that such irreparable injury is certain and manifest. Take the contract in this cause and can such irreparable injury fall upon appellee? Has he not an adequate remedy at law? It has been judicially determined by this in the case of *Johnson v. The Iron Mountain & Helena R. R., supra*, that not only a railroad, but this identical railroad, comes within the provisions of the statute of the State of Arkansas on the subject of forcible entry and detainer. It is alleged in the bill that Johnson is only entitled to the possession as security for his debt. If this be true then under the laws of Arkansas all that the appellee was required to do before suing out the writ of unlawful detainer and replevying this railroad was to tender to Johnson in possession the amount due under the contract as construed by them. Under the statute the remedy for the appellee to recover possession after any unlawful holding over by Johnson, was as summary

as this court adjudged it to be in favor of appellant when he was forcibly ejected from it. The remedy at law was full, complete and adequate and was the remedy provided by law when the contract was entered into in 1879. And as such must have been in contemplation of the parties who executed such contract.

Pritchard v. Norton, 106 U. S., 124.

Neither the bill, the order of the judge granting the injunction, nor the decree perpetuating it, settled in any manner the rights of the parties under the contract of April 23, 1879. A sum of money is simply substituted as appellant's security, instead of possession of the road, as provided in said contract.

The bill sets out the contract of April 23, 1879, entered into between the Iron Mountain & Helena Railroad Co. and the appellant, A. H. Johnson, and makes the contract an exhibit thereto; alleges that by its terms said appellant was entitled to hold and retain possession of said eighteen miles of railroad *until he should be fully paid the amount stipulated in said contract for such work;* that in September, 1880, after said appellant had built and completed said railroad, and while he was holding, using and enjoying the same under said contract, he was forcibly dispossessed of said railroad by the Iron Mountain & Helena Railroad Co. through its President, William Bailey; that appellant brought his action of forcible entry and detainer; that while said suit was pending appellee purchased said railroad from the Iron Mountain & Helena Railroad Co. and entered into possession; that judg-

ment was rendered in favor of appellant against appellee in the forcible entry and detainer suit, which judgment was affirmed by this court in 1887. The bill further charges that the sum named in the contract was not due appellant, but only the sum of $25,000 was due him; that when it purchased said railroad it did not purchase upon any belief that the sum of $25,000 was due appellant, but did purchase upon the representation of said Bailey that a far less sum than $25,000 was due said appellant and that he, Bailey, would furnish the evidence of such fact. That now appellant claims more than $25,000 and refuses to settle for said sum; that said sum of $25,000 is the full sum which appellee is liable to pay; that said appellant is preparing to take possession of said track and to that end is building a connection between the Arkansas Midland Railroad and said track so constructed by him, and if he is permitted to take such possession it will disable appellee from discharging its duty as a common carrier, from performing its contract for carrying the mail, and cause it to suffer irreparable damage and injury, for which it will have no adequate remedy at law, and prays that the appellant answer the matters and things set forth in the complaint, and in meantime that he be restrained from interfering with the possession of appellee as to said railroad, and upon a final hearing he be perpetually enjoined from any attempt to take possession of or any interference with said portion of such roadway. (Tr., pp. 1-4.)

It is manifest from the allegations and prayer of complainant's bill that it sought nothing except to maintain its

possession of the railroad and prevent appellant from enforcing the writ of possession awarded in the action of forcible entry and detainer.

Upon presentation of this bill to the Hon. Henry C. Caldwell, Judge of said District Court, he ordered that upon a deposit by appellee of $33,825, in the German National Bank of Little Rock, Arkansas, and the payment to the clerk of all costs in the case of A. H. Johnson v. The Iron Mountain & Helena Railroad Co., and the St. Louis, Iron Mountain & Southern Railway Co. (the forcible entry and detainer case), a temporary injunction should issue enjoining the appellant, his agents and attorneys from issuing or causing to be issued any process to put appellee out of the possession of said eighteen miles of railroad track. And upon payment of said sum into the depository of the court, appellant might demand and receive the same without prejudice to any of his rights *and particularly without prejudice to his right to recover any further sum that may be due him and for which he has by contract or the judgment of the court, a lien on said eighteen miles of said railroad track, or a right to the possession of the same as a security therefor.* (Tr., p. 8.)

It is evident from the terms of the bill that appellee did not seek to raise any question as to the contract or to determine in any manner the sum due to appellant under said contract for the construction of the road. There were many questions under that contract to be adjusted and settled between the parties to it.

First, the sum of money due for the construction of the road was disputed by appellee. The contract provided for the gross sum of $29,000, while appellee contended that through some subsequent arrangement a less sum than $29,000 was to be accepted by appellant.

Secondly, the appellant by the terms of the contract was to possess the road and have the right to use and operate it until said sum of $29,000 was fully paid.

The construction of this clause of the contract was in dispute between the parties. Appellant contended that the income resulting from the operation of the road was to be taken by him and he was in no manner to account for it, while appellee contended that appellant was to account for the earnings of the road. But even if appellee was correct in this, appellant furnished the rolling stock, eight miles of track and the terminals, and the value of the use of these was to be settled.

The prayer of the bill is that appellant be enjoined from taking possession of the road as provided in the contract, which right was affirmed by the judgment of the court. This was all the court was asked to do and that was all the court did. When the bill was presented to the learned judge, he directed that the $33,825 should be placed in the depository of the court and should be held there as appellant's security for the fulfillment of the contract and that appellant might receive; it but that neither the filing of the bill, nor the depositing of the money, nor the receiving it by appellant, should

be used by appellee in bar or preclusion of any suit which appellant might bring to enforce his rights under said contract of April 23, 1879. The eminent judge seemed to consider that $33,825 was a sum sufficient to equal the right of possession which appellant had under said contract, and the order of the judge, by its terms, gave the appellant the right to possess himself of $33,825 in lieu of the rights which the judgment in the action of forcible entry and detainer awarded to him. He could sue upon his contract, but he must leave appellee in possession of the road.

The contract was an obligation which was enforcible through the law courts. There was nothing in its terms which would enable either party to go into a court of equity for its enforcement. If the sum of money named in it was not due Johnson, the appellant, and an issue was formed on that question, it would have been an issue at law, triable on the law side of the court and to settle which either party had the right to demand the verdict of a jury. If, therefore, the bill had sought to have raised an issue in chancery as to the rights of the parties under this contract it would have been demurrable because a court of equity could have had no jurisdiction to determine it. The prayer for injunction could not have conferred any greater jurisdiction on a court of equity because such relief is granted as ancillary to or in support of some primary equity the enforcement of which is sought in the bill.

High on Injunctions, Sec. 7.

That the learned judge intended only to prohibit appellant from possessing the road is apparent from the decree, which in no manner settles any of the rights of the parties under the contract, but leaves them to be determined by suit in another forum. The court decreed that upon appellee paying into the registry of the court the costs of the suit and the sum of $1,000 for the amount expended by appellant in necessary preparation to take possession of the eighteen miles of railroad mentioned in the bill and operate the same as required by law, the appellant should be perpetually enjoined from executing or attempting to execute the judgment at law in his favor for the possession of said eighteen miles of railroad mentioned in the bill, but should said sums not be paid into the registry of the court within ninety days hence, the temporary injunction theretofore issued should be dissolved, and said appellant might sue out proper process and execute said judgment at law. (Tr., p. 55.)

In what position was appellant left? The decree of the court did not award him the $33,825 in settlement of his contract, it made no mention whatever of it. This sum of money was by the decree left in the registry of the court where it had been deposited. It was the security substituted by the court in lieu of the possession given by the contract, and the court in effect said to the appellant, "you may take that security or you may leave it as you see fit, but you can never obtain possession of this road either under the terms of the contract or under the judgment in the action brought by you for possession; you shall not, however, be precluded from

maintaining a suit on your contract in any court having jurisdiction.''

Counsel has not gone into the discussion of the testimony in this cause because, in the view taken by him, the court had no jurisdiction.

On the whole, counsel submits that the cause should be reversed and remanded with directions to dismiss the bill and dissolve the injunction.

JOHN J. HORNOR,
For Appellant.